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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79- 79-1853

DURHAM DISTRIBUTORS, INC. and
WATERCRAFT SALES CENTER, INC.,
PETITIONERS,

v.

BOMBARDIER LIMITED and
BOMBARDIER EAST,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE FIRST CIRCUIT

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v.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Durham Distributors, Inc. and Watercraft Sales Center, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 25, 1979.

Opinion Below

The opinion of the Court of Appeals is reported at 605 F.2d 1 (1st Cir. 1979) and is reproduced as Appendix A hereto (pp. A1-A40). The per curiam and dissenting opinions of the Court of Appeals rendered upon rehearing are reported at 1980 Trade Cas. (CCH) ¶63,197 (1st. Cir. 1980) and are reproduced as Appendix B hereto (pp. B1-B7).

Jurisdiction

The corrected judgment of the Court of Appeals was entered on July 26, 1979, *nunc pro tunc* July 25, 1979, and is reproduced as Appendix C hereto. On August 3, 1979, a timely petition for rehearing was filed by Petitioners. By order dated September 21, 1979, the Court of Appeals granted a rehearing with leave to the parties to file supplemental briefs limited to "the issue of the standing of Durham and Watercraft to recover under the horizontal restraints theory". See Appendix D hereto. On February 21, 1980, the Court of Appeals ordered "that the corrected judgment entered July 26, 1979, *nunc pro tunc*, remains in effect", Chief Judge Coffin dissenting. See Appendix B hereto. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Do two regional distributors, who were injured when their supplier was precipitously terminated pursuant to a *per se* illegal agreement to divide markets, and who were themselves the target of predatory conduct by defendants, have standing under Section 4 of the Clayton Act to sue for that injury?

Statutory Provisions Involved

Section 1 of the Sherman Act, as amended, 15 U.S.C. §1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal....

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Statement of the Case

In 1967 and 1968, Agrati-Garelli S.p.A. ("Agrati"), an Italian motorcycle manufacturer, entered into an agreement with Engine Specialties, Inc. ("ESI") pursuant to which Agrati agreed to manufacture minicycles[1] and to sell them to ESI as Agrati's exclusive distributor in North America.[2] (A3). ESI then entered into agreements with a number of regional distributors for the purchase and resale to retailers of the Agrati-manufactured minicycles. Petitioner Durham Distributors, Inc. ("Durham") agreed to act as ESI's New England regional distributor and petitioner Watercraft Sales Center Inc. ("Watercraft") agreed to act as ESI's distributor in Michigan and parts of Indiana. (A33).

The Agrati-manufactured minicycle was well received on the North American market. Press reviews were enthusiastic. (App. 4909-14). Durham, Watercraft and other regional distributors commenced purchases and sales of minicycles and expended substantial amounts of money and effort to promote the product. Their initial efforts were successful. For example, Durham's sales of minicycles and parts grew from $28,948 in 1968 to $280,785 in 1970. (App. 2171).

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[1] Minicycles are a type of small motorcycle.

[2] Citations to the Record Appendix in the Court of Appeals will appear with the prefix "App." The Court of Appeals decision of July 25, 1979 is referred to herein as "A" and the Court of Appeals opinions after rehearing are cited as "B".

Defendant Bombardier Limited ("Bombardier") is the largest manufacturer of snowmobiles in the world. (A4). It needed a summer product for its distributors and dealers to sell. Bombardier, therefore, attempted to develop its own minicycle product. (A4). The jury found that by 1970, Bombardier had both the intent and the ability to enter the market with a minicycle of its own manufacture. The Court of Appeals affirmed that finding. (A4, 16-18). Bombardier planned to begin selling its minicycles in competition with Agrati and others in early 1971. (A18).

However, Bombardier came to believe that the Agrati product then being marketed by ESI, Durham and Watercraft was technologically superior to the Bombardier minicycle. As a result, Bombardier's officers met with Agrati's officers on at least four occasions between August and November 1970. Bombardier threatened Agrati with immediate and devastating competition. (A28-29). By that device, Bombardier induced Agrati to enter an agreement with it. (A28-29). The jury found that the Bombardier-Agrati agreement (1) precluded competition between Bombardier and Agrati in North America, (2) divided territorial markets, and (3) required Agrati to sell minicycles exclusively to Bombardier in North America (and therefore not to sell minicycles to ESI). The trial court ruled that the agreement was a horizontal division of markets and agreement not to compete, a *per se* violation of Section 1 of the Sherman act. The Court of Appeals affirmed the jury's finding and the trial court's ruling. (A20-21).

Pursuant to the agreement not to compete, in late November 1970, Agrati terminated ESI without prior warning and commenced sales to Bombardier. (A7).

As a result of the Bombardier-Agrati agreement and the ensuing immediate termination of ESI, Durham and Watercraft found themselves, in the midst of a model year, without a minicycle product to sell and without enough time to seek

alternatives. Bombardier's conduct, however, did not stop there. Bombardier used "deceptive means" (A26) to discover the price structure used by ESI and its distributors. (A8).[3] It then marketed the Agrati minicycles through certain of its distributors at prices which were designed to undercut ESI's, Durham's and Watercraft's prices. (A8). The distributors utilized by Bombardier to market the Agrati minicycles included (1) defendant Bombardier East Inc., a wholly owned subsidiary of Bombardier and a direct competitor of Durham in New England, and (2) Heath International Inc., the direct competitor of Watercraft in Michigan. (App. 2184, 2442-3, 2474, 2543, 3656-3707).

Bombardier also attempted to persuade Agrati to refuse to sell parts to ESI for resale to its distributors, even though it knew that Agrati was contractually bound to sell parts to ESI in the event that it cancelled ESI's contract. (A8-9). As a result of Bombardier's efforts, ESI and its distributors were initially unable to obtain spare parts and later were able to obtain parts only after long delays and on unfavorable terms. (App. 2201-2202, 2411, 3976-3978, 4061-4063).

Moreover, Durham and Watercraft had previously emphasized to their dealers that they had the exclusive right to market Agrati minicycles in their respective market areas. When Bombardier obtained the Agrati minicycle, Bombardier, Bombardier East (Durham's competitior) and Heath (Watercraft's competitor) embarked on a marketing program which emphasized that they were now the sellers of Agrati minicycles. (A9). Bombardier's distributors (including Bombardier East and Heath) displayed these Agrati minicycles (which were identical to the minicycles theretofore sold by ESI, Durham and Watercraft except for a pasted-on Bombardier decal) at dealer trade shows. Bombardier East's

[3]The Assistant to the President of Bombardier, posing as a prospective distributor, tricked an ESI employee into disclosing inventory and pricing information (A8) and attempted to trick an ESI distributor into disclosing confidential information with respect to distributor's cost, and the dealer inventory requirement used by ESI's distributors. (App. 3406-9; 5406).

employees circulated false rumors about ESI's demise to Durham's dealers at a New England dealer trade show. (A9).

The combined effect of (1) the sudden loss of product, (2) the appearance of the same product at lower prices in the hands of Bombardier's distributors and dealers, (3) the interruption of parts supply, and (4) the advertising and rumor campaign conducted by Bombardier and Bombardier East, had a catastrophic impact upon Durham and Watercraft. Several witnesses testified that the sudden loss of Agrati minicycles and the immediate sale of the same product to dealers at lower prices destroyed Durham's and Watercraft's, as well as other distributor's ability to sell products to dealers. (App. 1472-73; 2191-2214; 2405-25; 2473-98; 2660-75; 3650-55; 3949-53; 3571-78; 3989-90; 4445-59). Bombardier's own expert witnesses conceded that the interruption of a distributor's parts supply could be expected to have a "devastating impact upon the dealers' loyalty to the product", as it did. (App. 3604). The advertising campaign and false rumors further damaged Durham's and Watercraft's relations with dealers who thought that they had the exclusive right to sell Agrati minicycles. (A9; App. 2484-87; 3652; 4880-81).

As a result, Durham incurred substantial losses in 1971 and went out of business in 1972. (App. 4462). Watercraft (which sold other recreational products) found itself unable to sell minicycles and abandoned the business late in 1971. (App. 2424-5).

The jury found, after a five week trial on liability, that defendants (including Durham's direct competitor, Bombardier East) had conspired not to compete, that the defendants' conduct had significantly lessened competition in the submarket in which the Agrati minicycle competed, and that defendants' conduct caused injury to Durham and Watercraft. (Answer to Special Interrogatories 3, 9 and 14, A.10-12). A four week damages trial ensued. At the end of that trial, the jury concluded that Durham had been damaged in the

amount of $102,000, and that Watercraft had incurred $20,000 in damages.[4]

During the pretrial and trial phases of this case, the District Court ruled on five separate occasions that Durham and Watercraft each had standing to sue Bombardier and Bombardier East. On appeal, Bombardier made only passing reference to the standing issue. (A33, fn. 23). The Court of Appeals nevertheless reversed the judgments in favor of Durham and Watercraft and held that Durham and Watercraft lacked standing to sue the defendants. (A33-36).

Durham and Watercraft filed a Petition for Rehearing. The petition was granted, as Chief Judge coffin stated, because of

> "the intrinsic importance of the issue of standing in private antitrust actions and the relative infrequency of Supreme Court review in this complicated area...". Coffin, C.J., dissenting. Appendix B, Appendix D1.

The standing question was then rebriefed. On February 21, 1980, the Court of Appeals (by a 2-1 majority) issued a *per curiam* opinion reaffirming its prior action without further stating the grounds for that action. Chief Judge Coffin dissented and filed a detailed opinion, which is described below and set forth in Appendix B.

This petition seeks review solely of the intrinsically important question of standing in private antitrust actions under Section 4 of the Clayton Act. 15 U.S.C. §15.

Reasons for Granting the Writ

I. Preliminary Statement.

Section 4 of the Clayton Act, 15 U.S.C. §15, states that "*any* person" who is "injured in his business or property" by

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[4] Those sums were then trebled by the court in accordance with 15 U.S.C., §15, and judgment was entered for Durham and Watercraft in the trebled amount.

conduct which violates the antitrust laws...shall recover threefold the damages by him sustained..." (Emphasis Counsel's). As this Court recently stated in *Reiter* v. *Sonotone Corp.*, __ U.S. __, 99 S.Ct. 2326, 2330 (1979):

> "On its face, §4 contains little by way of restrictive language....'The Act is comprehensive in its terms, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated....and the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending to have its naturally broad and inclusive meaning.' "

The Court of Appeals acknowledged that Durham and Watercraft suffered "economic injury". (A35). It stated that their injury was the "natural result" of depriving ESI of Agrati products and that this deprivation was, in turn, caused by a *per se* illegal horizontal agreement to divide markets. (A35). The Court of Appeals nevertheless concluded that this "injury does not bring [Durham and Watercraft] within the ambit of the protection of the antitrust laws" because "Watercraft and Durham were not the principal victims of the scheme to divide submarkets, but were innocent 'bystander[s] who [were] hit but not aimed at[.]' " (A33-34).

After rehearing, Chief Judge Coffin disagreed. He began by analyzing the harm done by the horizontal agreement not to compete and defining the question which was before the Court of Appeals. He said:

> "The underlying substantive antitrust violation which gave rise to this case was a horizontal agreement between Agrati and Bombardier to allocate territorial and product markets between themselves and terminate ESI's role in the distribution of Agrati minicycles...In this case, it is possible that the purchasers of minicycles, including ESI, Durham and Watercraft, would have benefited had

> Bombardier chosen to compete with Agrati rather than illegally agreeing not to do so. '[H]ad Bombardier and Agrati not so conspired, there would have been *two* minicycles...to choose from rather than the *one* that the conspiracy delved up.' 605 F.2d at 14...
>
> "This is not to say that ESI necessarily would have retained its ability to purchase minicycles for distribution. It is to say, rather, that the question whether ESI would retain that ability would have been determined by the forces of competition rather than by agreement between competitors...
>
> "...Durham and Watercraft...in effect tied their fortunes to ESI's success in obtaining access to the minicycle manufacturing and sales market...They did not...assume the risk that Agrati and Bombardier would get together, carve up their territories according to agreement and completely foreclose ESI from the minicycle market. When that foreclosure occurred, Durham and Watercraft suffered injury which was similar to, albeit derivative of, that suffered by ESI. All were foreclosed from the minicycle market as a result of the Agrati-Bombardier agreement. The key question therefore, is why should we distinguish between ESI on the one hand and Durham and Watercraft on the other on the issue of standing." (B3-5).

Judge Coffin then noted that insofar as the majority rested its decision on the ground that the injury to Durham and Watercraft was "derivative" of ESI's injury or that Durham and Watercraft were at a different level of distribution than was ESI, that decision was in conflict with the decisions of several other Courts of Appeals. (B5). (See pp. 10-17, *infra*).

He further observed that there is no risk of duplicative recoveries here because ESI, Durham and Watercraft each sought to recover its own separate lost profits and did not

present conflicting claims to a single fund, as had been the case in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). On the contrary, the Chief Judge stated, the majority decision below created the risk of "a windfall to defendant". (B6). Judge Coffin said that there was no difficulty in tracing the cause of Durham's and Watercraft's injury to defendant's conduct, particularly because "the basic product—the minicycle—remained unchanged as it passed from defendant to ESI and then to Durham and Watercraft". (B6).

The ultimate question, Judge Coffin observed, was whether Durham and Watercraft were "in the area of the economy affected by the illegal aspects of the defendants' actions". He concluded (1) that the affected area of the economy was the distribution of minicycles; (2) that Durham and Watercraft operated in that area of the economy; (3) that the defendants foreclosed Durham and Watercraft from access (through ESI) to their source of supply by an illegal agreement which "dictated the manner in which minicycles would be distributed" in that sector of the economy; and (4) that Durham and Watercraft had standing to recover for the very real injury caused by that agreement.

Judge Coffin reached this conclusion without relying on the fact that Durham was a competitor, at the same level of distribution, as defendant, co-conspirator Bombardier East, without noting that Durham was also injured by the pricing conduct of Bombardier East and the false rumors directed at its dealers by Bombardier East, and without referring to the other conduct by defendants (see pp. 5-6, *supra*) which was aimed at, and which foreseeably resulted in injury to, Durham and Watercraft.

II. The Decision Below Conflicts With Decisions of Other Courts of Appeals.

The Court of Appeals stated that defendants' conduct was directed at ESI, and that Durham's and Watercraft's injury was merely "derivative" of ESI's injury. From this premise the

Court of Appeals concluded that Durham and Watercraft had no standing to recover for damages which they in fact suffered. This decision is inconsistent with the decisions in several other Courts of Appeals. Those courts hold that a plaintiff has standing if it was in the area of the economy foreseeably affected by defendants' wrongful conduct and if it was injured by that conduct.

A. *The Ninth Circuit.*

The decisions in the Ninth Circuit do not limit standing to the entity which is the immediate victim of an antitrust violation. In *Solinger* v. *A & M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 60 L.Ed.2d 377 (1979) defendant terminated one of its distributors because the distributor refused to comply with an agreement to divide markets. Plaintiff was a prospective purchaser of the terminated distributor. The Court held that plaintiff had standing to sue because he (like Durham and Watercraft here) was in an area of the economy foreseeably affected by defendants' wrongful conduct. It said (at p. 1311, citing earlier Ninth Circuit cases):

> "In order to have standing under section 4 when the plaintiff has alleged violations of sections 1 and 2, *Solinger must show that the injury occurred within an area of the economy that foreseeably would have been affected* by the antitrust violation alleged. *See, e.g., In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974) (indirect purchaser in the chain of distribution foreseeably injured by price-fixing conspiracy); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964) (held that the plaintiff was within the area of the economy that the

> defendant could reasonably have foreseen would be affected by the alleged antitrust violations); *Hoopes* v. *Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967) (lessee's interest in certain property sufficient to allow lessee standing to sue for alleged antitrust violations, despite the fact that the lessor could also have sued, *because it was foreseeable* that the lessee's interest would be affected.)". [Emphasis counsel's]

Similarly, in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955), defendant Richfield was alleged to have violated the Sherman Act by restraining independent "Richfield" gas stations from purchasing car waxes other than wax sponsored by Richfield. Plaintiff was a manufacturer of a competing car wax which sold its product to distributors. The distributors then attempted unsuccessfully to resell car wax to the restrained Richfield dealers. Plaintiff alleged that it lost sales because of the reduced ability of its distributors to sell car wax. Plaintiff's injury was thus indirect and derivative of its distributors' inability to sell products. The Court held that plaintiff had standing. It stressed that standing is "not confined to persons in privity with the wrongdoers". It said:

> "Primarily the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. The impact was on the market. The gist of the violation was the prevention or impeding of the sale of these competitive products. Logically, and as found in the findings and conclusions of the trial judge in the Richfield case, the illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax. Such persons and such products were the 'target' of the illegal practices.

> "Apparently, Richfield's argument is in part, that the independent distributors of Karseal's wax might have a cause of action, but that Karseal is once removed from the distributors and therefore may not sue. We need not pass on whether such distributors have a cause of action. But it would appear that both the manufacturer and the independent distributor have such a cause of action."

Karseal is in square conflict with the decision below in this case. Here, as there, the plaintiff suffered injury because of an antitrust violation which struck initially at a company with which plaintiff had a close business relationship. Here, as there, defendant's object was to affect adversely competition in a particular segment of the economy and plaintiff operated in the adversely affected sector of the economy. Here, as there, plaintiffs lost sales and profits because of the restraint. In *Karseal*, plaintiff was held to have standing even though the first impact of defendant's conduct was upon plaintiff's distributors. But here, Durham and Watercraft were held *not* to have standing because the first impact of defendants' conduct was upon their supplier.

See also, *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 220 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964) (where the Court said that a plaintiff who was neither a competitor of, nor an immediate victim of, a restraint has standing because "whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy."); *Hoopes* v. *Union Oil Co. of California*, 374 F.2d 480 (9th Cir. 1967) (lessor of gas station held to have standing to sue for restraints which were directed at actual and potential lessees of the station); and *Harman* v. *Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964) (loan company has standing to sue for conduct which initially injured a bank which was the loan company's source of funds).

B. *The Fourth Circuit.*

In *South Carolina Council of Milk Producers Inc.* v. *Newton*, 360 F.2d 414 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966), plaintiffs alleged that defendants conspired to sell milk below cost in an effort to drive down the retail price of milk and to monopolize the market for milk and other grocery products. Plaintiffs were producers of raw milk who sold milk to entities which processed and resold that milk. Plaintiffs were not retailers and did not sell to retailers. Nevertheless, plaintiffs alleged that their own profits were adversely affected by defendant's wrongful conduct. The Fourth Circuit held that plaintiff's had standing. It said (at p. 418):

> "If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under section 4."[5]

C. *The Eighth Circuit.*

In *Sanitary Milk Producers* v. *Bergjans Farm Dairy Inc.*, 368 F.2d 679 (8th Cir. 1966), plaintiff Bergjans was a milk producer which sold its production to a distributor. Defendant's conduct adversely affected the sales of the distributor. Defendants claimed that plaintiff Bergjans did not have standing because the antitrust laws do "not give a private cause of action to a person whose losses result only from an interruption

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[5]The Court of Appeals purported to distinguish *South Carolina Council of Milk Producers*, *Hoopes* and *Harman*, *supra* on the ground that they involved "reversals of dismissals or summary judgments against plaintiffs, with the courts' commenting that a triable issue was presented on the pleadings", (A36). But if "a triable issue" is presented, then presumably the jury's specific factual findings and general verdict below are entitled to respect, absent a showing that they lack evidentiary support.

or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws." The Court, speaking through then Judge, now Mr. Justice, Blackmun, rejected that contention. It noted that the distributor sold exactly the same product as did plaintiff Bergjans. It held that a recovery by Bergjans "is not in the nature of a windfall", that Bergjans' injury was "something more than remote", and that "it would be less than realistic to say that Bergjans is not one which §4 of the Clayton Act, 15 U.S.C. §15, is designed to protect." Judge Blackmun, speaking for the Court, specifically stated that the decisions of the Ninth and Fourth Circuits discussed above were "sound in their approach and application and...persuasive precedent here." 368 F.2d at 689.

D. *Other Circuits.*

Other courts of appeal have reached similar results on facts which are analogous to those in the case at bar. In *Hennessey* v. *National Collegiate Athletic Ass'n.*, 564 F.2d 1136, 1148 (5th Cir. 1977), the plaintiffs were former assistant coaches who were injured when the NCAA adopted a rule limiting the number of assistant coaches which a member institution might employ. Although the "restraint" was formally upon the institution, the Fifth Circuit held that plaintiffs had standing to sue the NCAA. In *International Association of Heat and Frost Insulators and Asbestos Workers* v. *United Contractors Ass'n., Inc. of Pittsburgh*, 483 F.2d 384 (3rd Cir. 1973), the Third Circuit held that employees who were injured by alleged antitrust violations aimed at their employers have standing to bring suit under the antitrust laws.

See also district court decisions in *Johnson* v. *Ready Mixed Concrete Co.*, 318 F.Supp. 930 (D. Neb. 1970) and *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 35 F.R.D. 198 (D. Mass. 1964).

E. *Summary*

In the case at bar, like the cases described above, Durham and Watercraft were injured by conduct which violated the antitrust laws but which had its first impact on an entity with which plaintiffs had a close business relationship. Their injury was foreseeable. They were in the area of the economy which the defendants' conduct was intended to affect.

The case at bar presents an even more compelling case for standing than do many of the cases cited above. Here, Durham and Watercraft sold precisely the same product in precisely the same form as the product which was the subject of the restraint of trade. Here, Durham and Watercraft were victims of what the Court of Appeals called "an array of misdeeds" (A28) by the defendants which were designed to destroy ESI's distribution network. Many of these acts—especially deliberate underpricing and interruption of parts supply—were designed to impact upon dealers' loyalty to distributors like Durham and Watercraft.[6] Moreover, the jury found here that Bombardier's distributor, Bombardier East, a direct competitor of Durham at the same level of distribution, was a participant in the illegal conspiracy. Since Bombardier East's participation in the conspiracy consisted solely of conduct associated with the distribution of minicycles, the jury necessarily found Bombardier East's actions in intentionally underpricing Durham and spreading false rumors were an integral part of defendants' wrongdoing. That conduct inflicted direct and severe injury upon Durham.

Therefore, the Court of Appeals decision with respect to the standing of Durham and Watercraft is in plain conflict with the decisions of several other Courts of Appeals, as Judge Coffin stated below.

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[6]The Court of Appeals noted that defendants "intimidated ESI's distributors with the threat of the loss of their exclusivity and their ability to obtain needed spare parts." (A26-27).

III. The Court of Appeals Misinterpreted This Court's Decision in *Illinois Brick Co.* v. *Illinois.*

The Court of Appeals, while conceding that this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) is "not directly applicable here", nevertheless interpreted *Illinois Brick Co.* as indicating that standing would be denied to plaintiffs like Durham and Watercraft, "who are removed from the alleged anticompetitive acts". (A34-35). The Court of Appeals misinterpreted this Court's holding in that case.

Illinois Brick was a price fixing case. This Court held that a price overcharge could not be recovered by an indirect purchaser, because the entire amount of the same price overcharge could be recovered by a direct purchaser whether or not that overcharge was "passed on" to the indirect purchaser. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Recognizing that it would obviously be duplicative and unfair to permit the indirect purchaser to recover again for all or part of the same overcharge, this Court held that the indirect purchaser was not entitled to recover under Section 4 of the Clayton Act.[7]

The conversion of the *Illinois Brick* holding into a general prescription against recovery by anyone not in direct contact with a wrongdoer is mistaken. In the case at bar, unlike

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[7] This Court expressly observed in *Illinois Brick* (at p. 728, n.7) that:

> "Because we find Hanover Shoe dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F.2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of §4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under §4."

Illinois Brick, there is no risk of duplicative damages and there are not "conflicting claims to a common fund". See 431 U.S. at 737. Durham and Watercraft suffered damages which are entirely separate from ESI's damages. Durham and Watercraft lost profits and ultimately went out of the minicycle business. They are entitled to be recompensed for their *own* injury, even though ESI will also be recompensed for *its* separate damages.[8] As Judge Coffin correctly observed (B5-6):

> "The fact that the injuries to Durham and Watercraft derived from those to ESI gives rise to a concern that awarding damages to both sets of plaintiffs might result in the awarding of duplicative recoveries. In this case, however, ESI, Durham and Watercraft were joined as plaintiffs and the measure of damages employed was lost profits. Thus, granting Durham and Watercraft standing will not result in duplicative recoveries since each party will only be reimbursed for its own actual injuries, nor will the defendant incur the risk of inconsistent judgments. Indeed, the court's decision to deny standing might result in a windfall to the defendant. Moreover, since the lost profits measure of damages was employed

[8] The inapplicability of *Illinois Brick* to this type of case was recognized in *In Re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1108 (N.D. Cal. 1979), which held that an automobile rental firm ("Dollar") had standing to sue municipal airport officials for injuries which derived from the exclusion of Dollar's licensees from an airport market. The court refused to read *Illinios Brick* as a bar to standing since there was no serious threat of multiple liability, the plaintiff's losses were separate, and the method of proving damages was not unduly complicated. *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979); *Petro Stops Northwest* v. *Continental Oil Co.*, 1978-2 Trade Cases ¶62,305 (D. Ariz. 1978).

> and since the injury consisted of complete foreclosure from the market, allowing Durham and Watercraft standing would not create the complicated damage computations which the court in *Illinois Brick* sought to avoid with regard to 'pass on' damage measures in price fixing cases. See 431 U.S. at 740-45."

Moreover, the reliance on *Illinois Brick* to bar standing is particularly inappropriate where, as here, Durham's and Watercraft's injuries were not entirely "derivative" in nature, but were also caused by predatory conduct aimed directly at them (see pp. 5-6, 16, *supra).*

The misinterpretation of *Illinois Brick* by the Court of Appeals and the incorrect injection of *Illinois Brick* into the already confused and divergent body of decisions on antitrust standing provide separate and additional grounds for granting this petition.

IV. This Case Offers an Excellent Opportunity to Elminate the Wide-spread Judicial Disagreement Over Antitrust Standing.

This case illustrates the difficulty faced by lower courts as a result of the absence of a definitive statement on antitrust standing. The issue of Durham's and Watercraft's standing was considered by the District Court no less than five times: twice prior to trial, twice during the nine week jury trial, and once afterward. The jury was instructed (without objection) on this issue and returned verdicts in favor of Durham and Watercraft. The Court of Appeals included in its July 25, 1979 opinion a detailed discussion of its reason for reversing these verdicts. It felt compelled to grant a rehearing to Durham and Watercraft because of "the intrinsic importance of the issue of standing in private antitrust actions and the relative infre-

quency of Supreme Court review in this complicated area". (Coffin, C.J., dissenting). The ultimate decision reflected disagreement among the panel members not only as to the proper outcome but also as to the appropriate approach to take to the problem.

The fact that the courts below were required to consider the standing issue a total of seven separate times in the course of this litigation is not surprising in view of the wide disagreement among the Circuits on this issue.[9] Moreover, although the issue of standing arises frequently in antitrust litigation, this Court has never squarely addressed the question. As the Fifth Circuit commented in *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1174 (5th Cir. 1976):

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[9] Compare *Engine Specialties, Inc.* v. *Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979) ("target area" test requiring that defendants aimed directly at plaintiffs), with *Commerce Tankers Corp.* v. *National Maritime Union of America*, 553 F.2d 793, 801 (2d Cir. 1977) (target area test); *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 99 (3d Cir. 1977), *cert. denied*, 434 U.S. 823 (1977) ("a balancing test comprised of many constant and variable factors"); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 418 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966) (target area includes sector of economy which is threatened with a breakdown of competition); *Donovan Const. Co. Of Minnesota* v. *Florida Telephone Corp.*, 564 F.2d 1191, 1192 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978) (target area is sector of economy threatened with a breakdown of competition); *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975) ("zone of interests" test); *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978) (questions whether its former adoption of the *Malamud* standard is still good law after *Illinois Brick Co.* v. *Illinois); Reiter* v. *Sonotone Corp.*, 579 F.2d 1077, 1081-82 n.9 (8th Cir. 1978), *rev'd on other grounds*, 99 S.Ct. 2326 (1979) ("injury...something more than remote"); *Solinger* v. *A & M Records Inc.*, 586 F.2d 1304, 1311 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979 (target area includes area of economy that foreseeably would have been affected); *Farnell* v. *Alburquerque Publishing Co.*, 589 F.2d 497 (10th Cir. 1978) (direct injury test); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) ("casual connection between the injury and the defendant's allegedly illegal acts").

> "The statutory language upon which the courts have attempted to construct a doctrine of standing limiting who can complain of antitrust violations offers no clear guidance for determining who may sue. Despite extensive litigation of the standing issue in lower courts and a general predilection to review antitrust decisions, the Supreme Court has offered surprisingly little guidance on the standing question."

Some commentators have described the law of antitrust standing as a "decisional morass", lacking any "analytical framework that could make order out of chaos". D. Berger and R. Bernstein, *An Analytical Framework For Antitrust Standing*, 86 Yale L.J. 809, 840 (1977). Another commentator has stated that the "plain fact is that the standing-to-sue cases are irreconcilable". M. Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 28 (1971). Still another commentator believes that the conflict is so pronounced as to invite forum shopping by certain types of antitrust plaintiffs. Note, *Standing To Sue In Private Antitrust Litigation: Circuits in Conflict*, 10 Ind. L. Rev. 532, 554 (1977). The history of the instant case dramatizes the concern of one observer, who wrote:

> "As long as the Supreme Court is content to avoid the issue of section 4 standing,...the private claimant will be forced to gamble the high cost of antitrust litigation against the whims of the court on every section 4 action."

Comment, *Standing Under Clayton Section 4: A Proverbial Mystery*, 77 Dick. L. Rev. 73 (1972).

The fact that the above disagreements have been further compounded by the above-noted misinterpretation of this Court's decision in *Illinois Brick* (see pp.17-19, *supra*), provides an additional reason for the granting of this Petition.

Conclusion

This case offers the Court a unique opportunity to give guidance on the important and recurring issue of antitrust standing. This is an issue which has provoked a wide disagreement among the Courts of Appeals. The decision below is flatly inconsistent with decisions in several other circuits, and misinterprets a recent decision of this Court. Unlike many standing cases in which review has been sought, this case reaches the court after a full jury trial which was won by the petitioners. There is a complete evidentiary record and there are answers by the jury to special interrogatories. The Court also has the benefit of the District Court's opinions, the Court of Appeals' opinion of July 25, 1979, and the lengthy and well-reasoned dissent filed by Chief Judge Coffin on rehearing. Accordingly, the issue of standing comes to this Court well-defined and unencumbered with peripheral issues. Moreover, because standing was the sole ground for reversal by the Court of Appeals, the issue is entirely determinative of the Petitioners' case.

For each of the foregoing reasons, this Court should grant Durham and Watercraft's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals For The First Circuit denying them standing.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
Plaintiffs-Appellees,
v.

BOMBARDIER LIMITED *et al.*,
Defendants-Appellants.

Argued March 15, 1979

Decided July 25, 1979

John Vanderstar, Washington, D. C., with whom John D. Taurman, Covington & Burling, Paul B. Galvani, Washington, D. C., Ropes & Gray, Boston, Mass. and Paul V. Donahue, Pittsfield, Mass., were on brief for Bombardier Ltd., *et al.*

Thayer Fremont-Smith, Boston, Mass., with whom Robert S. Frank, Jr., Wm. Shaw McDermott, James A. McDaniel and Choate, Hall & Stewart, Boston, Mass., were on brief for Engine Specialties, Inc.

Before COFFIN, Chief Judge, BOWNES, Circuit Judge, PETTINE, District Judge.*

BOWNES, Circuit Judge.

On January 4, 1971, Engine Specialties, Inc. (ESI) sued Bombardier Limited (Bombardier) for tortious

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* Of the District of Rhode Island, sitting by designation.

interference with ESI's contractual relationship with Agrati-Garelli (Agrati) and for violating sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 which proscribe restraint of trade and attempted monopolization. ESI is a Pennsylvania corporation; Bombardier, a Canadian; and Agrati, an Italian corporation. An injunction, treble damages and attorney fees were sought pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On January 30, 1971, ESI moved to amend its complaint by adding an allegation of a violation of section 7 of the Clayton Act, 15 U.S.C. § 18.[1] Durham Distributors, Inc., an ESI distributor for the New England states, moved to intervene as a plaintiff in July, 1971; in the absence of any opposition, the motion was granted in August, 1971. On September 1, 1971, the district court issued a preliminary injunction against Bombardier. The court's opinion is reported at 330 F. Supp. 762. We affirmed, 454 F.2d 527. The district court granted the injunction after determining that ESI was likely to prevail on the merits of its tort claim, but specifically reserved opinion on the antitrust claims. ESI moved for a contempt citation against defendant on February 23, 1972, after Bombardier had allegedly violated the injunction which had been clarified by the district court in November, 1971, and January, 1972. Following a hearing, the court found that defendant had willfully violated the injunction and ordered damages and costs, including reasonable attorney fees to plaintiff. On September 6, 1972, the district court allowed plaintiffs' motion to join Bombardier East, Inc., defendant's wholly-owned Massachusetts subsidiary, and, on January 5, 1973, permitted Watercraft Sales Center, Inc., an ESI distributor in Michigan and parts of Indiana, to intervene as a party plaintiff. For purposes of our discussion, we will use the terms "Bombardier" to include both defend-

[1] Both the Sherman § 2 and the Clayton §§ 16 and 7 claims were dropped prior to submitting the case to the jury.

ants, and "ESI" to encompass plaintiffs ESI and its two distributors, Durham Distributors, Inc. and Watercraft Sales Center, Inc.

On March 14, 1977, after a five week trial, the jury found for all plaintiffs against both defendants on liability, and on April 13, 1977, the same jury awarded damages to ESI of $85,000 for tortious interference with contractual relationships and $400,000 for the antitrust claims, and antitrust damages to Durham of $102,000 and Watercraft of $20,000. The antitrust damages are subject to trebling. 15 U.S.C. § 15.

FACTUAL BACKGROUND

Since much of the factual background has already been reported in the opinion by the district court and by this court's affirmance, *see* 330 F.Supp. 762 and 454 F.2d 527, we sketch only those facts necessary for an understanding of the issues on appeal. The facts, and all reasonable inferences drawn therefrom, will be viewed in the light most favorable to ESI, the party prevailing in the proceedings below. *Anderson* v. *Iceland S.S. Co.*, 585 F.2d 1142, 1150 (1st Cir. 1978).

In 1967 and 1968, ESI and Agrati entered into an agreement providing that ESI would act as sole distributor for Agrati-manufactured minicycles in North America. The minicycles were made to ESI's specifications and were sold by ESI under the name "Broncco." The terms of their agreement provided that either party could terminate upon six months' notification. It further provided that if Agrati terminated the contract, it could not market, sell or supply the Broncco, either directly or indirectly, in North America for a period of two years following the contract's termination. In March, 1970, ESI and Agrati modified their agreement providing that if a default of the prior agreement occurred and continued for a period of twenty days, then the earlier agreement

would terminate without further action on either's part and that Agrati would be free of the restriction with respect to the sale of the Broncco in North America.

Bombardier, the world's largest manufacturer of snowmobiles, was interested in developing a summertime product which its extensive distributor and dealer network could market during the offseasons. Starting in 1969, it began to explore the possibility of entering the minicycle market and developed a minibike called the "Fun-Doo." However, since Bombardier was not entirely satisfied that the Fun-Doo would do well in the marketplace because of the type of transmission it had, Bombardier in 1970 corresponded with Czech, Taiwanese and Japanese manufacturers with the aim of arranging the foreign manufacture of minicycles for Bombardier. In August, 1970, Agrati met with Bombardier in Canada and discussed various proposals for the distribution and/or manufacture of minicycles. During this meeting, Bombardier informed Agrati that a decision would have to be reached quickly since otherwise, Bombardier would consider manufacturing a product of its own. On September 13, 1970, Bombardier met in Italy with Agrati and discussed the problems posed by Agrati's contract with ESI, which made ESI Agrati's sole distributor in North America and which forbade the sale by Agrati of the Broncco for a period of two years in the event that Agrati terminated the contract. On September 16, a meeting with representatives from ESI, Bombardier, and Agrati took place at Agrati's plant in Milan. Bombardier's interest in displacing ESI was made known and suggestions were proposed to ESI that in exchange for relinquishing its exclusive dealership it could be made a dealer for Bombardier and that Bombardier might invest in ESI. Agrati emphasized to ESI that Bombardier would come into the market independently if an agreement could not be arranged and that, because of Bombardier's size,

it would overwhelm the competition. ESI maintained that its contract with Agrati would have to be honored and refused the proposals made by Bombardier. It was then decided between Bombardier and Agrati that Agrati would send the six month termination notice to ESI. It was also agreed between Bombardier and Agrati that, because of the six month lag, Bombardier would put its own Fun-Doo on the market that year. The remainder of Bombardier's visit with Agrati centered around plans for circumventing the two year proscription contained in ESI's contract.

During October, Bombardier became increasingly dissatisfied with the capabilities of its Fun-Doo and decided to pursue discussions with Agrati to push ahead with a joint venture between the two companies, whereby Bombardier and Agrati would form a company on a 60/40 basis, with Bombardier in control. Bombardier also inquired as to whether Agrati had sent the cancellation notice to ESI, which, in fact, Agrati had done.

On October 16, 1970, Agrati advised ESI that it had failed to open certain lines of credit and that this was a breach of contract. No mention was made of the twenty day provision allowing cancellation of the contract if said alleged breach remained in effect for the prescribed period. On October 19, an intervening phone call from Agrati was construed by ESI to constitute a waiver of the alleged breach.

No contract provision called for the establishment of the line of credit within the time demanded by Agrati. By letter of October 26, ESI informed Agrati that (1) it had until May, 1971, to fulfill its contract commitment to purchase 3,000 vehicles; (2) ESI had agreed with Agrati in August, 1970, to postpone the Fall shipments because of Agrati's late shipments earlier in the year; (3) Agrati's call of October 19, wherein Agrati agreed to change the shipping schedule, had superseded Agrati's

letter of October 16 which had claimed default on the part of ESI. ESI's position on these matters was made known to Bombardier by Agrati during the November meetings in Philadelphia, *see* below, and its October 26 letter discussed. Notwithstanding this, Bombardier and Agrati agreed to claim default by ESI and terminate ESI's contract.

On November 4 and 5, Agrati met with Bombardier in Philadelphia, with Agrati's American counsel. At this meeting, the 1968 and 1970 contracts with ESI were discussed (Agrati provided copies of all the agreements to Bombardier for its examination) and it was decided that Agrati would claim that ESI had breached the contract and had failed to remedy the breach for a period of twenty days, thus resulting in termination of the contract. On November 6, after a telephone call during the Philadelphia meeting to Agrati in Italy, a cable was sent by Agrati to ESI demanding that a line of credit be set up. The cable also "reminded" ESI of the contract termination which was to occur on May 20, 1971.[1a] No mention whatsoever was made of the immediate breach should ESI fail to establish the demanded lines of credit within twenty days. During the Philadelphia meetings, Bombardier proposed to Agrati that it share the costs which Agrati might incur as damages resulting from its termination of the ESI contract. This action was taken in an attempt to assuage Agrati's concern that it might be sued by ESI for breach of contract. Bombardier was encouraged by the 1970 contract, of which it had previously been unaware, providing for termination in case of a breach continuing for twenty days. Armed with the perceived ability to avoid the ESI contract free of the two year proscription, Bombardier urged Agrati to

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[1a] As provided by the contract, either party could cancel with six months notice to the other. Agrati had sent notice to ESI in November, 1970. *See* discussion *supra* at 3-4.

insist on a default as soon as the twenty day period for opening the lines of credit referred to in Agrati's October 16 letter expired. On November 25, Agrati notified ESI that the contract was terminated.[2]

Bombardier travelled to Italy for meetings running from November 12 through November 18. An agreement was finalized incorporating the parties' understanding arrived at during the Philadelphia meetings. It was agreed that Agrati would deliver immediately[3] to Bombardier Broncco minicycles and parts if and when ordered. Also reduced to writing was Bombardier's agreement to compensate Agrati for damages arising from any future lawsuit for breach of contract with ESI. The two agreements were initialed by both parties on November 14. Part of the agreement was that a European holding company would be organized to actually perform Agrati's functions. Later, this conceit was dropped and Agrati was recognized as the real party to the contract.

The contract which served as the basic operating agreement between Bombardier and Agrati at first envisioned a joint venture, whereby a Canadian company would be formed to assemble and/or manufacture and/or sell certain designated motorcycles. Bombardier was to act as the sales agent for the newly formed Canadian com-

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[2] ESI submitted the question of breach of contract to arbitration, as required by the contract with Agrati. In June, 1972, the arbitration tribunal ruled that Agrati had breached the contract; ESI then obtained a suspension of arbitration proceedings on the question of damages pending the outcome of the instant suit.

[3] In the first draft of the agreement, Agrati had stated that it would not provide the Broncco for a two year period after May 20, 1971, thus acknowledging the terms of the 1968 contract with ESI. Bombardier demurred, stating that its understanding from the Philadelphia meeting was that Agrati would start shipping the vehicles immediately, since Agrati was going to declare a default by ESI. The terms were changed accordingly.

pany.[4] The agreement forbade either Bombardier or Agrati from manufacturing, assembling, or acting as sales agents other than in the manner described above. In the event that either Bombardier or Agrati developed and finalized a completely new product in the motorcycle field, it would be offered in the following manner: (a) if developed by Agrati and in the range of 50cc. to 100cc., it would be offered to Bombardier for sale and manufacture in North America; (b) if developed by Bombardier and in the range over 100cc., it would be offered to Agrati for sale and manufacture through its motorcycle distribution organization, but Bombardier would have the right to sell it through its own distribution network outside North America. The contract further provided that Bombardier was to act as the exclusive agent for Agrati in the North American market. The term of the contract was for an initial period of five years.

On December 1, the Assistant to the President in charge of Bombardier's minicycle project called ESI under the guise of wanting to become an ESI distributor. During this phone conversation, Bombardier ascertained ESI's inventory, pricing and other information on the Broncco. In January, 1971, Bombardier notified its sales and advertising personnel that it was now marketing the Agrati minicycle under its own label. The notice informed them that ESI would no longer have the Broncco in its line of minicycles and stated that, whereas ESI had been pricing the Broncco at $344.95 without lights, Bombardier would market its minicycle at $339.95 with lights.

During the Spring of 1971, ESI, pursuant to its contract with Agrati, ordered spare parts for vehicles already ordered. Agrati contacted Bombardier inquiring,

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[4] As events subsequently developed, the Canadian company, which was to be the joint venture link between Bombardier and Agrati, never materialized.

in light of the fact that Bombardier was now Agrati's exclusive dealer in North America, about the possibility of Agrati's making direct delivery to ESI of the requested spare parts. Bombardier responded by saying that it wanted to supply the parts to ESI and that Agrati should forbear shipping any parts. Agrati then replied, after conferring with its attorney, that the terms of the 1970 agreement with ESI provided that, even in case of breach, spare parts would have to be shipped to ESI directly by Agrati for a period of six months following breach and that, since the termination of ESI occurred on November 25, 1970, Agrati's obligation would run until May 25, 1971.[5] Bombardier thereupon agreed to Agrati's making the delivery directly.

Bombardier, during the early months of 1971, released press announcements concerning its new line of minicycles featuring the Agrati engine. During a trade show in January, 1971, Bombardier people informed an ESI dealer that Bombardier had bought part of Agrati's stock, giving it a controlling interest in the firm and that the Broncco would not be available to the ESI dealer in the near future. And in the Summer, 1971, the ESI dealer reported that the local Bombardier dealer started selling the Bombardier equivalent to the Broncco. The loss of the exclusiveness of the Broncco product made the ESI dealer decide to give up the Broncco line during the 1971 season.

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[5] ESI's position was that the contract was terminated on May 1, 1971, and that it, therefore, had a right to obtain parts from Agrati for six months thereafter. For all orders after May, 1971 Agrati insisted upon ESI's establishing a line of credit, for payment at time of shipment, rather than the previously prevailing policy of payment on a 120 day accepted draft whereby ESI had 120 days following the date of shipment to make payment.

ESI's net profit before taxes was as follows:

for the fiscal year

1968 — $19,708
1969 — 35,527
1970 — 63,809*

(* $124,000 prior to extraordinary and nonrecurring expenses.)

ESI's supply line was terminated in November, 1970, two months into its 1971 fiscal year; losses for that year amounted to $261,000.[6] In 1972, ESI suffered a net loss of $816,000 and, for all practical purposes, went out of business.

QUESTIONS ON APPEAL

The jury responded to special interrogatories, see Fed. R.Civ.P. 49(b), as set forth in the margin.[7]

Bombardier argues on appeal that the court erred in not entering judgment notwithstanding verdict, or in the alternative, in not ordering a new trial and specifically raises the following points. (1) It alleges that ESI's claim that the agreement between Agrati and Bombardier constituted a division of markets and, hence, a per se violation under the Sherman Act fails for two reasons, first, that the agreement was merely a joint venture and thus not susceptible to the per se proscriptions of the Sherman Act, and, second, that ESI's injury resulted

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[6] This figure representing net loss to the company, included all sales of all products, not just the Broncco.

[7] The jury's answers were as follows:

1. On count I, the jury's decision on the claim that Bombardier tortiously induced the termination of ESI's exclusive distributorship of Agrati-Garelli's minicycles is for the *Plaintiff*.

2. On count I, the jury's decision on the claim that Bombardier tortiously adduced Agrati-Garelli to breach its contract with ESI is for the *Plaintiff*.

3. On count II, the jury's decision on the claim that defendants injured plaintiffs by conspiring with Agrati-Garelli not to compete is for the *Plaintiff*.

[Footnote continued on page A11]

from the substitution of Bombardier as Agrati's distributor, a wrong not redressable under the per se rule.

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[7] [Continued]

4. On count II, the jury's decision on the claim that Bombardier injured ESI by conspiring with Agrati-Garelli to eliminate ESI as a competitor is for the *Plaintiff*.

5. Did Bombardier purposely induce Agrati-Garelli to *terminate its business relationship* with ESI by unfair means or by violations of the antitrust laws such as are alleged in count II?

Answer yes or no: *Yes*

6. Regarding ESI's claim that Bombardier purposely induced Agrati-Garelli to *breach its contract* with ESI, was there at the time of the alleged inducement a contract between ESI and Agrati-Garelli to which they were both bound?

Answer yes or no: *Yes*

7. If yes to the previous question, did Bombardier know of ESI's rights under the existing contract and purposely induce Agrati-Garelli to breach it?

Answer yes or no: *Yes*

8. Regarding plaintiffs' claim that Bombardier was a potential competitor of Agrati-Garelli, did Bombardier prior to November 14, 1970 have the intent and ability to market cycles like the "Fun-doo" of its own manufacture by the end of the summer of 1971?

Answer yes or no: *Yes*

9. Regarding the first of plaintiffs' two conspiracy claims, was injury to plaintiffs' business or property proximately caused by Bombardier's not entering the market with cycles like the "Fun-doo" of its own manufacture?

Answer yes or no: *Yes*

10. Regarding ESI's second conspiracy claim, did Bombardier and Agrati-Garelli conspire to drive ESI out of business and use unfair means to do so?

Answer yes or no: *Yes*

Note: Proceed to answer questions 11, 12, 13 and 14 only if the answer to question 10 is yes.

11. Did plaintiff's Broncco minicycle compete in a relatively broad submarket which included the Yamaha Mini-Enduro and Honda Trail '70?

Answer yes or no: *No*

[Footnote continued on page A12]

(2) Bombardier complains that ESI's antitrust claim that Bombardier and Agrati conspired to destroy ESI by unfair means, thereby lessening competition in a relevant market, lacked a sufficient evidentiary base for the jury to find either predatory conduct or impaired competition in a relevant market. (3) Bombardier urges that ESI's regional distributors, Durham and Watercraft, who were joined as plaintiffs, had no standing to press the antitrust complaint and that the damages for Durham lacked evidentiary support. (4) On the tort claim, Bombardier claims that the court erroneously applied Pennsylvania rather than Italian law and that, even under Pennsylvania law, the court erred in not instructing the jury that it had to find a purpose to cause harm. (5) Finally, Bombardier forwards the view that the court erred in finding a willful violation of the preliminary injunction and in awarding damages, lost profits, and attorney fees.

ESI has filed a cross-appeal in the event that we order a new trial on liability. The issues raised in the cross-appeal relate to damages and the court's limitations on the proof plaintiffs were allowed to adduce in support of its claims. ESI complains also of certain evidentiary rulings and jury instructions.

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[7] [Continued]

12. If yes to the previous question, was competition in that submarket significantly lessened as a result of the conspiracy described in question 10?

Answer yes or no: ——

13. Did plaintiff's Broncco minicycle compete in a relatively narrow submarket which did not include the Yamaha Mini-Enduro and Honda Trail '70 but rather minicycles such as Indian, Yankee Boss and Premier BB?

Answer yes or no: *Yes*

14. If yes to the previous question, was competition in that submarket significantly lessened as a result of the conspiracy described in question 10?

Answer yes or no: *Yes*

THE LAW

A. *Conspiracy to Divide Markets*

Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]" 15 U.S.C. § 1. As aptly stated by Mr. Justice Brandeis, however: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). In making this inquiry, the Court, over the years has identified certain behavior which by its very nature is destructive of competition; for this, the Court has fashioned per se rules. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1950); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). For restraints of trade outside the narrow band of the inherently anticompetitive, the rule of reason applies. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60, 31 S.Ct. 502, 55 L.Ed. 619 (1911). *See National Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

Our task is to determine into which of these two categories the complained-of behavior falls.

At the outset, we observe that joint ventures, without more, are judged against the standard of reasonableness rather than the per se rule. *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 168-72, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964). However, the nomenclature "joint venture" does not automatically exempt a combination from the per se rule which is found to have elements inherently offensive to the antitrust laws.

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 975, 95 L.Ed. 1199 (1951). Nor is it a per se violation to unilaterally grant an exclusive distributorship to a firm, even when that entails cutting off a former distributor. *See United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 376, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *overruled on other grounds, Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 139 (2d Cir. 1978), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1979); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 and cases there cited (9th Cir. 1969), *cert. denied* 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). If Bombardier's agreement with Agrati fits within the neat contours of these restraints, the correct analysis is whether, under the rule of reason, the restraint offends the antitrust laws. ESI alleges that the agreement between Bombardier and Agrati, in fact, constituted a division of markets and was not simply a joint venture or exclusive dealer-

ship. A division of markets between competitors at the same horizontal level [8] is a per se violation. *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra*, 433 U.S. at 58 n. 28, 97 S.Ct. 2549; *Topco Associates, supra*, 405 U.S. at 608, 609 n. 9, 92 S.Ct. 1126; *United States* v. *Sealy, supra*, 388 U.S. at 357 n. 5, 87 S.Ct. 847.[9]

The contract on its face envisioned a joint venture (which never came to fruition) and the appointment of Bombardier as Agrati's exclusive dealer. It did, however, include certain language which ESI reads as imposing territorial restrictions on Agrati and Bombardier. If, as ESI urges, those two companies are deemed to be operating at the same level in the market place, such an agreement would be illegal per se and the fact that the alleged territorial restrictions were linked to a joint venture cannot immunize it from the reach of the antitrust laws. *Timkin* [sic] *Roller Bearing Co.* v. *United States, supra*, 341 U.S. at 598, 71 S.Ct. 971.

The first step in our inquiry is to ascertain whether Bombardier and Agrati can be deemed to have been operating at the same horizontal level in the market, thus triggering the per se rule should territorial restrictions be found.[10] Agreements not to compete among potential com-

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[8] Competitors operating at the same level of the market structure are considered horizontal competitors. *United States* v. *Topco Associates*, 405 U.S. 596, 608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

[9] For earlier cases holding that territorial allocations among horizontal competitors constituted per se violations of the antitrust laws see *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 574 and cases there cited (2d Cir. 1961).

[10] Bombardier on appeal attacks the application of the per se rule to the arrangement with Agrati since it claims that the per se rule has never been read to reach an arrangement between the two companies, one of which is not yet already established in the market. Bombardier failed to object to this aspect of the jury instructions. We cannot emphasize strongly enough that in the absence of plain error—and none is here found—a party should not attempt to undo an appeal what it failed to do at trial by way of jury instructions.

petitiors as well as among actual competitors are forbidden. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 378, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). *Cf. Zenith Corp.* v. *Hazeltine*, 395 U.S. 110, 125-9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). *See also United States* v. *Pan American World Airways, Inc.*, 193 F.Supp. 18, 41 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (restraint of potential competitior constitutes violation of section 2 of the Sherman Act, 15 U.S.C. § 2). It must be shown, however, that the potential competitor—Bombardier—had the necessary desire, intent, and capability to enter the market at Agrati's level, *viz.*, manufacturing.[11] There is no dispute that Bombardier was not actually *manufacturing* minicycles at the time it entered into agreement with Agrati. But Bombardier had developed a prototype, called the Fun-Doo, and had indicated to Agrati that, if an agreement could not be worked out between them, Bombardier would press ahead with a product of its own. Bombardier stipulated that in the Spring, 1971, it had truthfully boasted there was "no part of a motorcycle that we [Bombardier] cannot produce." The jury specifically found that, prior to November 14, 1970, Bombardier had the intent and ability to market cycles by the end of the summer of 1971 of its own manufacture like the Fun-Doo.[12]

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[11] Bombardier was operating at the sales level; Agrati also, through its agent ESI, was operating at the sales level in North America. The agreement between Bombardier and Agrati contained language restricting competition between the two at both the sales and manufacturing level. See *infra* at 10-11 for specific agreement terms.

[12] This determination is properly one of fact rather than law and was thus correctly submitted to the jury for its judgment. On appeal, Bombardier does not argue that the question whether Bombardier and Agrati were horizontal competitors—either actual or potential—should have been determined by the court as a matter of law rather than by the jury as a matter of fact.

Our standard of review is whether there is sufficient support in the record for this jury finding. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-7, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). If we can reach but one conclusion after reviewing the evidence and all inferences drawn fairly therefrom in the light most favorable to the plaintiff (the prevailing party) and if that conclusion differs from the jury's, only then can the finding be set aside. *Ibid.; Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 and cases there cited (1st Cir. 1978). Even if contrary evidence was presented and conflicting inferences could be drawn, it is for the jury to draw the ultimate conclusion. *Tennant* v. *Peoria & P. U. Ry Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944), and such determination will not be disturbed unless the condition described above is met.

After reviewing the evidence in this light, we conclude that there was adequate record support for the jury's finding. Perhaps as telling a piece of evidence as existed was the stipulation by Bombardier itself that in 1971 it could produce all parts necessary for a motorcycle. The president of Bombardier, Beaudoin, testified that it was the agreement made between Agrati and Bombardier in November, 1970, which caused Bombardier to decide not to manufacture a product of its own in 1971. There was evidence that Bombardier had developed, manufactured, and tested the Fun-Doo in 1970. Beaudoin testified that the Fun-Doo was designed to appeal to the same segment of the population as the ESI model. In September, 1970, Beaudoin informed Bombardier's board of directors that the Fun-Doo, developed by Bombardier, would be placed on the market that year. It was acknowledged that Bombardier was interested in developing a summertime product for its distributors and had chosen the minicycle to fulfill this purpose; there was also testimony from Bombardier's motorcycle engineer that it had the manu-

facturing capacity in terms of engine facilities and equipment plant necessary to enter the motorcycle marketplace.[13] In October, 1970, Bombardier's marketing department drew up a production and sale schedule for the Fun-Doo, which called for all phases to be completed by the end of 1970. There was also testimony that at various junctures Bombardier had intimidated Agrati with the threat of entering the market immediately with its own minicycle if an agreement could not be worked out between them. These facts, viewed together, adequately underpin the jury's finding that Bombardier had the requisite intent and ability to enter the mincycle market on its own by the end of summer, 1971.

Having concluded that there is adequate record support for the jury's finding that Agrati and Bombardier were potential competitiors at the manufacturing level, compare *United States* v. *Penn-Olin Co., supra,* 378 U.S. at 175, 84 S.Ct. 1710, we now analyze the language which ESI contends illegally divided markets. If we concur that the contract language embraced territorial restrictions, the application of the per se rule would be appropriate.

The pertinent parts of the agreement[14] between Bombardier and Agrati provided:

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[13] Bombardier's chief motorcycle engineer who testified on this point also stated that Bombardier had no tooling or production experience in the motorcycle line. The jury was, nonetheless, entitled to weigh this remark against the other evidence and testimony indicating that Bombardier had the requisite production capability to manufacture its own minicycle product. In fact, the engineer testified that it had been his opinion in early 1971 that, while a great deal of work needed to be done in terms of production orientation, Bombardier had the potential of entering the marketplace.

[14] The version cited in the text is that of Agrati's letter of February 23, 1971, to Bombardier clarifying two earlier versions of the contract. The original contract was initialed by the parties in November, 1970, and was subsequently modified by Bombardier's

6) * * * [N]one of the parties hereto will manufacture and/or assemble nor act as agents for the sale of motorcycles in North America, either directly or indirectly, during the term of this agreement, with the exception of the products manufactured and sold by the company "Les Industries Bouchard Ltee" or under the trade-mark "Moto-Ski".

6b) * * * [I]n the event that Bombardier or Agrati-Garelli develops and finalizes a completely new product in the motorcycle field, this product should be mutually offered in the following manner:—if they are products developed by Agrati-Garelli (in the range 50cc. to 100cc.), they should be offered to Bombardier for sale and manufacture in North America;—if they are developed by Bombardier and are in the range of over 100cc., they should be offered to Agrati-Garelli for sale and manufacture through its motorcycle distribution organization, but Bombardier will keep the right to sell them through its own distrbution organization outside North America. The offered party must advise in writing its decision to manufacture and market within one hundred and eighty (180) days, or forfeits its right in this regard.

In case the offering party is not like [*sic*] to reach an understanding with the other party on the new products quantities the latter would be prepared to sell and/or manufacture, then the former is free to distribute directly worldwide such new products.

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letter of January 21, 1971, to Agrati and by Agrati's February 23, 1971, letter in response. Beaudoin, the president of Bombardier, accepted the amendments proposed by Agrati in its February 23 letter by letter dated February 23, 1971. The parties here stipulated that the written agreement of November 14, 1970, as modified by the two subsequent letters, was the basic operative document under which Bombardier and Agrati were doing business.

6c) Provisions contained in sub-paragraph b) herein above shall also apply to any motorcycles presently manufactured by Agrati-Garelli other than the mini-bike road model mini-bike motorcross, and Junior Cross types as described in Appendix B of this Agreement.

The jury specifically found that Bombardier and Agrati had conspired not to compete. We think that a fair reading of the above-quoted contract yields that finding. Paragraph 6a) is not offensive in and of itself; it purports to state merely that neither of the parties to the joint venture will compete with it by acting as agents for other parties. Paragraph 6b), however, limits the ability of both Agrati and Bombardier to compete; Agrati is foreclosed from selling or manufacturing any new motorcycle in the 50cc.-100cc. range within North America. Bombardier cannot manufacture any new product outside North America, although it retains the right to sell any product in the over-100cc. range through its own distribution network outside North America. Paragraph 6c) extends the restrictions of 6b to Agrati's existing lines, with the enumerated exceptions. In other words, Bombardier is free of Agrati's competition in both sales and manufacturing in North America and Agrati is free of Bombardier's competition in manufacturing outside North America. This, we think, rises to the level of a territorial allocation of markets.[15]

While Bombardier argues on appeal that the contract restrictions were simply incidents of a valid joint venture agreement, and thus reviewable under the rule of

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[15] Present here also was behavior directed at ESI which the jury found to be unfair and anticompetitive on the part of Bombardier. *Compare United States* v. *Penn-Olin Co.*, 378 U.S. 158, 176, 84 S.Ct. 1701, 12 L.Ed.2d 775 (1964); *Oreck Corp.* v. *Whirlpool Corp.*, 563 F.2d 54, 58 (2d Cir. 1977), *aff'd on rehearing*, 579 F.2d 126 (1978), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1979).

reason rather than the per se rule, such an approach must fail for two reasons. First, joint ventures which partake of behavior identified as inherently pernicious to competition such as price fixing or territorial allocations will be judged under the per se rule rather than under the rule of reason. The talisman of "joint venture" cannot save an agreement otherwise inherently illegal. *United States* v. *Sealy, supra*, 388 U.S. at 353, 87 S.Ct. 847; *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 823 and 826-31 (7th Cir. 1978), *cert. denied* 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979). Secondly, in the context of this case, the argument that a joint venture can immunize inherently anticompetitive behavior from scrutiny under the per se rule is ineffectual since the parties agreed, in the amendments proposed by Agrati on February 23, 1971, and accepted by Bombardier, to form a joint venture only if, after study it appeared feasible to do so. That same amendment contained the restrictive language which has been cited above. In fact, the joint venture never materialized. It is clear, then, that the restrictive covenants were not mere incidents to a joint venture, but were substantive agreements in themselves, with an existence independent of the joint venture.

To sum up, the jury could properly have found that Bombardier had the requisite intent and ability to enter the market as a manufacturer of minicycles by the end of the 1971 Summer and that this, therefore, pitted Bombardier and Agrati against each other as potential competitors at the manufacturing level. The agreement entered into between the two potential competitors constituted a territorial allocation of markets such as to bring it within the ambit of per se prohibition. Our next task is to determine whether the fact of this conspiracy to divide markets caused the injury of which ESI complains.

B. *Was There Antitrust Injury?*

Bombardier contends that even were it found to be a potential competitor of Agrati and even had the two conspired to divide geographic markets, the injury sustained by plaintiff was unrelated to the alleged antitrust violation.[16] In other words, did ESI's claimed harm flow from that which makes Bombardier's activity illegal, *i.e.*, the anticompetitive effect of the scheme to divide markets. We look to *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), a case which, Bombardier argues teaches that the injury suffered by ESI is not compensable under the antitrust laws. Brunswick, the largest operator of bowling alleys, acquired several failing alleys which had defaulted in payments for equipment purchased from Brunswick, which was also one of the two largest manufacturers of bowling equipment in the United States. Competing bowling alleys brought suit alleging that Brunswick's acquisition might substantially lessen competition

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[16] The analytical distinction between standing and antitrust injury is somewhat elusive. At one point, Bombardier suggested that —even presuming that it had engaged in the illegal division of markets—ESI was not the proper party to be bringing suit, *i.e.*, that it lacked "standing" to sue. The United States, it was suggested, was the proper party to sue. We think that in the case before us the distinction between standing and antitrust injury is not vital to the result, but we do view the two as conceptually distinct. As one commentator expressed it: "For example, the plaintiffs in *Brunswick*, as defendant's competitors, clearly had standing to challenge the acquisitions under the deep pocket theory; what was lacking was their inability to relate their claimed injury to the acquisitions' alleged *anticompetitive* consequences." Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum.L.Rev. 979, 997 (1977) (emphasis in original). For other discussions of this issue, *see Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *In Re Multidistrict Vehicle Air Pollution M.D.L., No. 31*, 481 F.2d 122, 125-30 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfg. Ass'n*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973).

or tend to create a monopoly in violation of section 7 of the Clayton Act, 15 U.S.C. § 18. Damages were sought pursuant to 15 U.S.C. § 15 for the reasonably expectable profits the plaintiffs would have earned had the failing alleys closed and the business which Brunswick picked up by operating them gone instead to plaintiffs. The Court held that notwithstanding the existence of the section 7 violation, which was not contested before the Supreme Court, plaintiffs could not recover since the unlawfulness of the acquisitions was due to Brunswick's status as a "deep pocket" in a field populated by "*pigmies*" and there had been no showing that plaintiffs' injuries stemmed from an abuse of Brunswick of its deep pocket. The Court observed that plaintiffs would have suffered the exact same harm had the failing alleys been purchased by "shallow pocket" companies or obtained refinancing. *Id.* at 487-90, 97 S.Ct. 690. The Court concluded,

> [F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. at 125, 89 S. Ct. 1562.

Id. at 489, 97 S.Ct. at 697. (emphasis in original).

Bombardier contends that ESI's claims are like those of plaintiffs in *Brunswick*, *viz.*, it would have suffered the exact same injury had Agrati simply engaged in familiar switched-distributor behavior. As we noted pre-

viously, unilaterally cancelling an exclusive distributorship and substituting another company does not rise to the level of a per se violation of the antitrust acts, irrespective of the harm thereby caused to the cancelled distributor.[17] Bombardier claims that whatever evil might have flowed from the purported illegal division of markets, ESI's harm was not causally linked to it.

Before we analyze the issue of antitrust injury in further depth, we think it instructive to note several key factors distinguishing *Brunswick* from the case at bar. (1) *Brunswick* was a section 7 case, 15 U.S.C. § 18; our case entails antitrust claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, with damages sought pursuant to 15 U.S.C. § 15. Section 7 is the antimerger section and speaks in terms of preventing future injury, *viz.*, mergers are prohibited where their effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). *See Brunswick*, *supra*, 429 U.S. at 485, 97 S.Ct. 690. Both sections 1 and 2 require a showing of actual harm by plaintiff. *See generally* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127, 1128-34 (1976). (2) Plaintiffs in *Brunswick* never proved that they had actually suffered any harm, but only that they had suffered defeat of their expectation of additional profits. Here, by contrast, plaintiffs suffered actual harm. (3) There was no proof of anticompetitive behavior by defendant Brunswick; there was such proof here. (4) In *Brunswick* there was no diminution of competition—the failing businesses were revived by the defendant and the plaintiffs continued as healthy enterprises. ESI went out of business not long after the alleged injury. We note these distinctions between *Brunswick*

[17] For a case holding that cancellations of distributor at urging of competing distributor constitutes a per se violation by the manufacturer, *see Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).

and this case in order to focus more keenly on the specific issues we face. See *Ohio-Sealy, supra*, 585 F.2d at 832 n.16.

To determine the merits of Bombardier's *Brunswick* argument, we first note that plaintiffs here are entitled to have all the proof they adduced at trial viewed together, with an end toward proving their complaint. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra*, 370 U.S. at 698-9, 82 S.Ct. 1404. ESI introduced evidence that not only had Bombardier and Agrati illegally conspired to allocate markets between themselves, but, as a necessary consequence, had determined to eliminate ESI as a competitor at the same time. Because of its exclusive distributorship with Agrati, ESI stood in the way of the conspiracy's aim to allocate the sales market for minicycles to Bombardier.[18] *See Lee-Moore Oil Co.* v. *Union Oil Co. of Calif.*, 599 F.2d 1299 (4th Cir. 1979) (distributor whose contract was cancelled allegedly pursuant to conspiracy among producers has standing under section 4, 15 U.S.C. § 15, to allege *Brunswick*-type antitrust injury). Indeed, ESI was offered inducements for acceding to the conspirators wishes and only after refusing to do so was cancelled.[19] Furthermore—and as the

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[18] Although there is no allegation that Bombardier was a monopolist in the snowmobile business, it sold over 50% of the snowmobiles sold in the United States and had sales from all products of more than $160,000,000 plus an extensive dealer network in the United States and Canada. There is no gainsaying that Bombardier possessed the economic muscle to overwhelm ESI, whose sales in 1970 amounted to $727,320, and to induce Agrati to cooperate with it. *Compare George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 559 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975).

[19] At trial, ESI pressed a claim premised on *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), that the concerted action taken by the conspirators Agrati and Bombardier to induce ESI to comply with the plan to divide territorial markets constituted a violation. *See id.* at 45-47, 80 S.Ct. 503. ESI argued that the affirmative action taken in cancelling it following ESI's refusal to go along with the illegal plan constituted

jury specifically found—Bombardier induced Agrati to terminate its contract with ESI by unfair or illegal means. ESI introduced evidence of Bombardier's threats to enter the market independently against the Agrati line unless Agrati agreed to do business with it. Bombardier urged Agrati to cut ESI off precipitously with no advance notice, thus depriving ESI of the opportunity to search for an alternate source of supply prior to termination. Bombardier then later attempted to dissuade Agrati from supplying parts to ESI which were contractually called for, even in case of cancellation. There was proof that Bombardier deliberately underpriced its Agrati cycle vis-a-vis the price of ESI's Broncco and that Bombardier used deceptive means for obtaining inventory, pricing and other information from ESI. In essence, as part of the territorial scheme, Bombardier worked to eliminate ESI as a viable competitive force in the minicycle market.[20] Bombardier had indicated to ESI distributors that they would no longer have exclusive rights to the Broncco and that Bombardier itself would soon be marketing the Agrati-made cycles. Bombardier released press statements that it would now be carrying the Agrati line. Had Agrati been free to sell in North America through its former distributor ESI, Bombardier could not have claimed exclusivity on the Agrati models nor intimidated

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a violation under *Parke, Davis*. There was also the suggestion that the cancellation amounted to a concerted refusal to deal and thus illegal under *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). As neither of these theories is advanced on appeal, we need not reach the question of their applicability.

[20] While much of this evidence also is probative of the so-called "Whitten" claim, 508 F.2d 547, alleging a section 1 violation, 15 U.S.C. § 1, for intentional attempts to drive a competitor out of business by unfair methods with a concomitant impact on competition, all the evidence adduced at trial to prove antitrust violations should be viewed together as it relates to plaintiffs' claims. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

ESI distributors with the threat of the loss of their exclusivity and their ability to obtain needed spare parts. The Court in *Brunswick* noted that plaintiffs there had failed to link their loss to the claimed antitrust violation (*i.e.*, *Brunswick's* "deep pocket"), intimating that had proof of abuse of the deep pocket been introduced, the result would have been different. 429 U.S. at 490, 97 S.Ct. 690. Here, by contrast, plaintiffs introduced evidence of anticompetitive behavior by defendants, all linked to the antitrust evil. Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, *supra*, 585 F.2d at 833 n.17; *Foremost-McKesson* v. *Instrumentation Laboratory*, 527 F.2d 417, 420 (5th Cir. 1976). There was adequate evidence to support a finding that the territorial scheme, with its corresponding unfair and anticompetitive behavior aimed at ESI, was a material factor in plaintiff's injury.[21]

Bombardier argues ingenuously that the market division actually stimulated competition by introducing a potent force into the minicycle market. This disregards the fact that had Bombardier and Agrati not so conspired, there would have been *two* minicycles for the public to choose from—Agrati's Broncco and Bombardier's competing model, either the Fun-Doo or some other version—rather than the *one* which the conspiracy delivered up.

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[21] Bombardier states that ESI was a mismanaged company and that the minicycle was in a state of decline and that these accounted for its demise. There may have been more than one cause of ESI's failure; plaintiffs had only to prove that defendants' behavior was a material cause of it. The jury found that defendants injured ESI by conspiring with Agrati not to compete and to eliminate ESI as a competitor. Based on a review of the pertinent evidence, we cannot say these findings lack record support. *See Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 885 (1st Cir. 1967).

This situation is thus not akin to that in *Brunswick* where competition was actually fostered by the continued presence of the once-failing businesses. Here, competition was curtailed, both as between Agrati and Bombardier and in that ESI was driven out of business and thus eliminated as a competitor.

Bombardier also contends that ESI's injuries would have been identical had Agrati merely switched distributors to a company such as Sears,[21a] an act which would not impute a per se violation of the antitrust laws. We are mindful of the danger articulated by Judge Frankel and fixed upon by defendants, namely, of converting a "garden variety" business tort into an antitrust violation. *Vogue Instrument Corp.* v. *Lem Instruments Corp.*, 40 F.R.D. 497, 499 (S.D.N.Y. 1966). *See also George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 560 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407 (1975). Our view of the etiology of this case convinces us that this is not being done here. There existed an array of misdeeds which "reflect[ed] the anticompetitive effect either of the violation or of anticompetitive acts [which were] made possible by the violation." *Brunswick, supra*, 429 U.S. at 489, 97 S.Ct. at 697. It was Bombardier's stance as an imminent potential entrant in the market which induced Agrati to succumb to Bombardier's blandishments. Had Agrati desired merely to switch the distributorship from ESI to Sears, there would have been no need to act as abruptly, cancelling the ESI contract in November, 1970, under the guise of a breach by ESI after lulling ESI into a false sense of security by having sent less than three weeks earlier a reference to the cancellation effective May, 1971. It was Agrati's desire to stave off an immediate threat of competition by Bombardier which

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[21a] For purposes of this argument, it is assumed—and was argued below—that Sears lacks independent manufacturing capability.

spurred it to cancel ESI and then agree to the strategy of declaring a default in November. It was Bombardier's urgent desire to put a summertime product on the market forthwith which led to the sudden excising of ESI as Agrati's exclusive dealer. A company like Sears, lacking independent manufacturing capacity, could not have presented the same threat of competition to Agrati. Nor could it have presented the lure of foreclosing competition in the marketplace as did Bombardier.[21b] This was a quid pro quo: Agrati would surrender its current dealership with ESI in exchange for the promise of no competition from Bombardier and Bombardier would exchange its ability to enter the market against Agrati in exchange for the exclusive dealership as well as a promise of no competition from Agrati. In short, it was Bombardier's position as an imminent competitor which impelled Agrati to accede to its demands. It strains reasonable expectations to believe that the trumped up charge of default would have been used had Agrati merely wished to switch distributors. Instead, Agrati would have used the contract term calling for termination on six months notice to either party and it would not have looked to Bombardier for an agreement to indemnify it for damages arising from a breach of contract action brought by ESI. Bombardier's status as a giant in the recreational vehicle field, its extensive network of dealers and distributors, and its expressed intentions to look elsewhere for a competing product should Agrati fail to reach an agreement with it led inexorably to the division of markets. And in order to accomplish the division of markets, it

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[21b] We do not understand Bombardier's argument to mean that, had Sears used the type of coercive tactics which had been employed by Bombardier, the mere fact that it lacked manufacturing capability could protect its behavior from the reach of the antitrust laws. *See Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). Our analysis above is premised on the argument that, had Agrati unilaterally switched distributors to a company like Sears, ESI would have sustained the same injury.

was necessary to deprive ESI of the Agrati product, which was done precipitously with no lead time thus depriving ESI of the opportunity to obtain its supplies from another source. The ineluctable result of the allocation of markets was that Agrati could no longer provide minicycles to ESI. *See United States* v. *Topco, supra,* 405 U.S. at 612, 92 S.Ct. 1126. We have here the type of *antitrust* injury which was found lacking in *Brunswick.*

C. *Need to Reach "Whitten" Claim—Effect on Damages Verdict*

ESI advanced two theories in support of its position that Bombardier had violated section 1 of the Sherman Act, 15 U.S.C. § 1, and caused it injury. The first was the division of markets theory, discussed above. Because we have affirmed on that issue, we do not reach the *Whitten* claim. *See George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc., supra,* 508 F.2d 547. *See* n.20, *supra.* In boiled down format, the *Whitten* theory was argued to show that Bombardier had conspired with Agrati to eliminate ESI as a competitor in the minicycle market. ESI introduced evidence, much of which has been summarized above, to show unfair methods employed by Bombardier. The essential difference in proof between the *Whitten* and the division of markets theories is that the latter is a per se violation whereas the former, given our gloss, 508 F.2d at 561-2, is generally governed by the rule of reason. *Whitten* went to the jury here under the rule of reason, after ESI had introduced evidence to establish a narrow submarket and a lessening of competition therein. *See* Jury Answers to Interrogatories Nos. 11, 13, 14, *supra,* at n.7.

Bombardier made a fleeting suggestion in its brief that, since only one damage verdict was returned for both antitrust theories, the invalidity of either requires setting aside the damage award, citing two cases in sup-

port of its position. *North American Graphite Corp.* v. *Allan*, 87 U.S.App.D.C. 154, 184 F.2d 387, 389 (1950); *Dillon* v. *Barnard*, 328 Mass. 53, 101 N.E.2d 345, 346 (1951).[22] Since we are not reaching the *Whitten* issue, we examine whether liability premised solely on the division of markets claim is sufficient to uphold the antitrust damage award.

The measure of damages under both antitrust theories is the same. *Compare North American Graphite Corp.* v. *Allan, supra*, 184 F.2d 387 (measure of damages for breach of contract claim different from *quantum meruit* claim). *See also United States* v. *Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973). Both theories were pleaded in one count and the same facts permissibly adduced to prove both. *Compare Mueller* v. *Hubbard Milling Co.*, 573 F.2d 1029, 1030 & 1038-9 (8th Cir. 1978), *cert. denied*, 439 U.S. 865, 99 S.Ct. 189, 58 L.Ed.2d 174 (1979) (general verdict vacated where evidence impermissibly admitted as proof of contract breach, though admissible to prove fraud and impossible to determine on what basis jury grounded its verdict). This aspect of the case presented the jury with only *one* conspiracy in violation of section 1 of the Sherman Antitrust Act. ESI was entitled to present all the proof relating to the anticompetitive behavior to the jury "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide, supra*, 370 U.S. at 699, 82 S.Ct. at 1410. Two theories were presented in support of plaintiffs' demand for relief. The court properly protected defendant against a double recovery for the same

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[22] *Dillon* v. *Barnard* does not advance the cause of defendant any more than *North American Graphite Corp.* v. *Allan*. In *Dillon*, the court reversed the grant of defendant's motion for directed verdict on the grounds that the general verdict could be sustained only if shown that plaintiff was not entitled to go to the jury on either of the two counts. *North American Graphite* is distinguished in the text *infra*.

injury by instructing the jury that it was to return solely one damage verdict on the antitrust claim. No objection was taken to this element of the court's instruction: had Bombardier viewed itself as dangerously prejudiced by the failure of the court to request the jury to segregate its damages verdict for each of the theories, wo do not understand its failure to bring this to the attention of the trial judge. *Compare Mueller* v. *Hubbard Milling Co., supra,* 573 F.2d at 1030 and 1038. Plaintiffs in fact highlighted this segment of the court's instruction as needing clarification, *viz.*, explaining to the jury that it should return a separate damages verdict on both the tort claim *and* the antitrust claim, even though it might find that plaintiff sustained the same injury under both the tort and the antitrust claims. We think defendant's failure to request a segregation of the damage verdict under each of the antitrust theories was not inadvertent, but rather the result of a clear-sighted tactical decision: by informing the jury that it should allocate damages between the two theories, there existed the strong possibility that the jury—which had already found defendant liable under both theories—would cumulate the damages and return a more substantial verdict.

This is not an instance of a jury's returning a general verdict on two separate claims where the reviewing court is unable to determine whether its verdict rested on a permissible rather than an impermissible ground. *Compare Morrissey* v. *National Maritime Union of America,* 544 F.2d 19, 26-7 (2d Cir. 1976); *Albergo* v. *Reading Co.,* 372 F.2d 83, 86 (3d Cir. 1966), *cert. denied,* 386 U.S. 983, 87 S.Ct. 1284, 18 L.Ed.2d 1284 (1967); *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, Maatschappij,* 275 F.2d 188, 190 (2d Cir. 1960). Here, the jury responded to interrogatories, *see* Fed.R.Civ.P. 49(b), and specifically found Bombardier liable under both antitrust theories. By upholding one of the theories, we need not reach the question of whether the jury was

likewise correct in premising liability on the second. *Vareltzis* v. *Luckenbach Steamship Co.*, 258 F.2d 78, 80 (2d Cir. 1958). *Cf. Roy* v. *Star Chopper Co., Inc.*, 584 F.2d 1124, 1136 (1st Cir. 1978), *cert. denied*, 440 U.S. 916, 99 S.Ct. 1234, 59 L.Ed.2d 466 (1979) (finding of liability under strict liability obviates necessity of finding liability under warranty count.)

D. *Standing of Durham and Watercraft to Sue*

Defendant urges us to reverse the damage awards to ESI's distributors Durham and Watercraft for lack of standing to sue under section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 reads in pertinent part that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." Bombardier argues that neither Durham nor Watercraft is covered under this section.[23] The claims of Watercraft and Durham rest solely on the division of markets theory.

Watercraft and Durham were both ESI distributors of the Broncco; both rest their claims on the fact that ESI's exclusive distributorship with Agrati was terminated, resulting in their inability to obtain any further Broncco minicycles and having to compete with the Bombardier/Agrati cycle, with a consequent loss of sales. This injury does not bring them within the ambit of the protection of the antitrust laws. Watercraft and Durham were not the principal victims of the scheme to divide markets, but were innocent "bystander[s] who [were]

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[23] The one paragraph of its brief which Bombardier devotes to the issue of whether Durham and Watercraft have standing cannot be said to have aided the court in its determination of the matter. We are also puzzled by the absence from the appendix of Bombardier's papers, filed with the district court on this issue. We assume that the motion papers and memoranda filed below contained a more detailed argument for opposing standing than the meager one advanced before us.

hit but not aimed at[.]" *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649, 89 S.Ct. 1871, 1875, 23 L.Ed.2d 599 (1969), quoting *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). Recovery of treble damages is potent ammunition intended not only to protect the aggrieved, but to deter the wrongdoer. The courts have attempted to keep the range of the barrage within the target area thought to have been intended by Congress in passing the antitrust legislation. *See e.g.*, *Hawaii* v. *Standard Oil of Calif. Co.*, 405 U.S. 251 and cases cited at 262-3 n.14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1168-9 (7th Cir. 1978), *cert. denied*, 440 U.S. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 498-9 (1977); *Universal Brands, Inc.* v. *Philip Morris, Inc.*, 546 F.2d 30, 34-5 (5th Cir. 1977); *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125-31 and cases cited at nn.7, 8 and 9 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfg. Ass'n*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1293-7 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972). A principal concern has been to avoid duplicative recoveries. In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Court rejected the pleas of indirect purchasers that they be permitted to sue manufacturers for overpricing materials sold to them via the direct purchasers. The Court discussed the need to avoid "unwarranted multiple liability," *id.* at 730, 97 S.Ct. 2061, by limiting the right to bring suit to the direct purchasers.[24] Though *Illinois Brick* is not directly

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[24] In *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), while confirming that consumers who pay higher prices as a result of illegal price fixing have sustained an injury to their "property" as that term is used in 15 U.S.C. § 15

applicable here since it involved a narrow question concerning the offensive use of the "pass-on" rule, it does articulate the caution to be employed in assessing claims of parties who are removed from the alleged anticompetitive acts.

The conspiracy between Bombardier and Agrati to divide markets was not aimed at the market level at which Durham and Watercraft were operating. It was the particular configuration of facts whereby elimination of ESI as Agrati's distributor was necessary to effectuate the territorial scheme which brought ESI so clearly within *Brunswick*. Watercraft and Durham argue their harms in terms of the loss of sales—due either to the loss of the Broncco or the loss of its exclusivity—because ESI was cut off by Agrati. Watercraft and Durham belong to that class "who have suffered economic damage by virtue of their relationship with 'targets' . . . rather than by being 'targets' themselves." *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc., supra*, 454 F.2d at 1295. The antitrust injury was suffered by ESI alone, although the economic injury was suffered by all three plaintiffs. The conspiracy to divide markets was not directed at Durham and Watercraft's level, *i.e.*, distribution. The anticompetitive acts taken against ESI were directed solely at ESI as part of the scheme to divide territories and not at either of its two distributors. Although the natural result of depriving ESI of the Agrati product was to likewise deprive ESI's distributors

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the Court specifically reserved opinion as to whether the direct-purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), would bar recovery. In explaining the holding of *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the Court stated that the "central premise" of that case was the Court's concern over "duplicative recoveries." *Reiter*, —— U.S. at ——, 99 S.Ct. 2326.

of it, we think that the distributors lie outside the target area section 4 encompasses. *Ibid.*[25]

We therefore conclude that neither Watercraft nor Durham had standing under section 4 of the Clayton Act, 15 U.S.C. § 15.

E. *The Tort Claim*

Bombardier contends that judgment should be entered in its favor on ESI's claim of tortious interference with a contractual relationship and tortious inducement to

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[25] ESI cites several cases to bolster its view that Watercraft and Durham have standing under § 4. *Hoopes* v. *Union Oil Co. of Calif.*, 374 F.2d 480 (9th Cir. 1967); *Sanitary Milk Producers* v. *Bergians Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934, 87 S.Ct. 295, 17 L.Ed.2d 215 (1966); *Harman* v. *Valley National Bank of Arizona*, 339 F.2d 565 (9th Cir. 1964); *Twentieth Century-Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964). Those cases do not advance the argument. Factually, all are different; substantively, three of the cases, *Hoopes*, *South Carolina Council of Milk Producers, Inc.*, and *Harman*, involved reversals of dismissals or summary judgments against plaintiffs, with the courts' commenting that a triable issue was presented on the pleadings. The Supreme Court has cautioned against summary procedures in antitrust litigation. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). The other cases relied on by ESI are clearly not apposite, since the anticompetitive acts were either specifically directed at the plaintiff or entailed injury within the market level at which plaintiff was operating. *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1969), adds no weight to ESI's position: Perkins *directly* suffered price discrimination in its purchases from defendant Standard and the Court aptly said that Standard could not protect itself from a Robinson-Patman violation by adding one layer to the distribution system. *Perkins* in no way lessens the requirement for standing under § 4 of the Clayton Act, *i.e.*, one must be within the "target area" to receive protection. Here, by contrast with the cited cases, the anticompetitive acts were not levelled against Watercraft and Durham, but rather against ESI. The market area affected by the conspiracy to divide markets at the manufacturing level does not impact the distributing level except, remotely, indirectly and incidentally.

breach contract on two grounds: first that the court below erroneously applied the law of Pennsylvania rather than Italy, and, second, that even under Pennsylvania law, ESI failed to present a jury claim.

1. *The Conflicts Question*

Massachusetts conflicts law governs which law should apply to the tort claim. *Klaxton* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Roy* v. *Star Chopper Co., Inc., supra*, 584 F.2d at 1128. Massachusetts has historically adhered to the lex loci deliciti conflicts rule for torts. *Brogie* v. *Vogel*, 348 Mass. 619, 205 N.E.2d 234 (1965). Recently, the Massachusetts Supreme Judicial Court, while maintaining its adherence to this rule for "the vast majority of issues in multistate torts suits[,]" *Pevoski* v. *Pevoski*, 371 Mass. 358, 358 N.E.2d 416, 417 (1976), indicated that where the question revolved around standards of conduct, it would look to the law of the jurisdiction having the strongest interest in resolving the particular issue presented. *Ibid.* This test is found in the Restatement (Second) of Conflict of Laws §§ 145, 146 (1971). *See also Tessier* v. *State Farm Mutual Ins. Co.*, 334 F.Supp. 807, 808 (D. Mass. 1971), *aff'd*, 458 F.2d 1299 (1st Cir. 1972). Applying either test, we find no error in the district court's application of Pennsylvania rather than Italian law.[26] The place of injury is where plaintiff suffered the harm, i.e., at its place of business, Pennsylvania.

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[26] ESI contends that, in fact, no different result would obtain irrespective of whether Italian or Pennsylvania law is applied. This has been termed the "false conflicts" theory by Prof. Brainerd Currie. Comment, *False Conflicts*, 55 Calif.L.Rev. 74 (1967). *See In Re Air Crash Disaster At Boston, Mass.*, July 31, 1973, 399 F.Supp. 1106, 1115 n.13 (D.Mass. 1975). This theory is invoked when (1) there is no true conflict of laws because only one state is interested in the application of its law or (2) the laws of the two states are found to be compatible. It is the latter prong on which ESI forwards its argument.

The forum with the most significant contacts is similarly Pennsylvania: (a) It is the place where the injury occurred. (b) It was at the November, 1970, meeting in Philadelphia that Bombardier and Agrati initialed their agreement not to compete and appointed Bombardier Agrati's new exclusive dealer. The formal signing in Italy later was admitted by Bombardier's president to be a mere confirmation of the Philadelphia accord, so that it was there the conduct occurred which caused ESI's injury. (c) ESI is a Pennsylvania corporation and Bombardier a Canadian one; as between Pennsylvania and Italy, Pennsylvania should be favored since at least one of the parties is incorporated there. *See* Restatement (Second) of Conflict of Laws § 145.

2. *Pennsylvania Law on Tortious Interference*

Bombardier alleges that Pennsylvania requires a showing of intent to cause harm in suits claiming tortious interference with contractual relations, citing *Birl* v. *Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (1960), and *Glenn* v. *Point Park College*, 441 Pa. 474, 272 A.2d 895 (1971). Neither case stands for the proposition that a specific intent to cause harm is essential to a case of tortious interference. *Birl* restates the common law rule that an intentional, unprivileged interference with a contractual relationship given rise to a tort action. The court there relied on the Restatement of Torts § 766 which articulates the rule. The *Birl* court makes it clear that intent to cause harm in the sense that defendant must evince "malice" toward plaintiff is not required, merely that defendant must act with the purpose of causing the specific harm cited, *viz.*, interfering with the known contract. *Id.* at 474. *Glenn* v. *Point Park College*, *supra*, extends liability to interference with prospective contractual relations as well. The Pennsylvania court quotes the Restatement (Second) of Torts § 766A, Comment d (Tent. Draft No. 14), to wit, that defendant must intend the interference and have acted at least in part to

effectuate the interference. 272 A.2d at 899. *See also Adler, Barish, Daniels, Levin, etc.* v. *Epstein*, 393 A.2d 1175, 1181-4 (Pa. 1978). There is no warrant for finding either that the court below improperly instructed the jury on the intent necessary to sustain liability under the tort or that there was an absence of probative evidence from which the jury could have found that Bombardier knowingly, intentionally, and improperly interfered with ESI's contractual relationship and induced Agrati to cancel its contractual relationship with ESI.

F. *Lost Profits and Attorney Fees for Willful Contempt*

The district court enjoined Bombardier from selling Agrati minicycles in September, 1971. We affirmed. 454 F.2d 527. After requests by Bombardier for clarification, the district court made clear that the injunction extended to spare parts for the cycles. Notwithstanding the fact that the court twice indicated that the injunction covered spare parts, both Bombardier and its subsidiaries continued to sell them, up until and after the time a motion for contempt was filed in February, 1972, by ESI. On July 27, 1972, the district court found Bombardier to have willfully violated the preliminary injunction and found it in civil contempt. The court accordingly ordered damages, to be based on all sales of spare parts made or supplied by Agrati to Bombardier from September 13, 1971, through July 27, 1972. Damages were computed at the list price for which ESI would have sold the parts. The court allowed plaintiff to recover all attorney fees incurred in prosecuting of the contempt proceeding. Bombardier here argues that the court erred in permitting full damages and in permitting ESI to recover attorney fees for its counsel's standard hourly billing rates multiplied by the hours actually spent on the contempt matter. Bombardier puts itself in a vulnerable position by arguing either point. As the court below found, Bombardier's actions with respect to the preliminary injunc-

tion were willfully contemptuous. We find nothing to suggest that the court's method of computing damages was improper. As far as attorney fees go, Bombardier stymied ESI at every juncture during the proceedings—which lasted for two and one-half years following the July 1972, finding by the court of willful contempt—for a determination of costs and damages. ESI was forced twice to seek a motion to compel, see Fed.R.Civ.P. 37, and engaged in extensive and contested discovery to ascertain the true amount of damages. The predictable result of such behavior is that ESI's attorney fees were much higher than they would have been had the necessary information been disgorged earlier and easier. We do not find that the district court abused its discretion in allowing recovery of full attorney fees in prosecuting the contempt.[27]

The judgment is reversed with respect to Durham and Watercraft with an order that judgment n.o.v. be entered for defendants as to those plaintiffs. In all other respects, the judgment is affirmed.

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[27] Bombardier contends that time spent on theories which the district court rejected in finding contempt should not have been chargeable against Bombardier. The amounts in question approximate $1,150. A total of $20,115.14 in fees and costs was allowed by the court. We find no abuse of discretion in the court's refusing to excise relatively minor amounts of time spent by plaintiff's counsel on theories which the court ultimately rejected. Bombardier ran the risk of incurring attorney fees by its contumacious behavior. That the plaintiff was unable to successfully predict which theories the court would accept and which it would reject requires a nicety we are not willing to impose. "Certainly it was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights . . . ." *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 428, 43 S.Ct. 458, 466, 67 L.Ed. 719 (1923).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
Plaintiffs, Appellees,

v.

BOMBARDIER LIMITED, *et al.*,
Defendants, Appellants.

JUDGMENT

Entered February 21, 1980

This cause came on to be submitted upon supplemental memoranda and briefs.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: After consideration of the petition for rehearing and the briefs filed in connection therewith, it is ordered that the corrected judgment entered July 26, 1979, nunc pro tunc, remains in effect.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Vanderstar and Fremont-Smith.]

No. 78-1492

ENGINE SPECIALTIES, INC.

v.

BOMBARDIER LIMITED, ET AL.

Before COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge*,
PETTINE, *District Judge.**

For plaintiff-appellant: *John Vanderstar (John D. Taurman*, of Covington & Burling, *Paul B. Galvani*, of Ropes & Gray, and *Paul V. Donohue*, with him on brief).

For defendants-appellees: *Thayer Fremont-Smith (Robert S. Frank, Jr., Wm. Shaw McDermott*, and *Choate, Hall & Stewart*, with him on brief).

[Dissenting Opinion]

COFFIN, Ch.J. (dissenting): In view of the intrinsic importance of the issue of standing in private antitrust actions and the relative infrequency of Supreme Court review in this complicated area, we granted rehearing in this case to reconsider whether plaintiffs Durham Distributors, Inc. (Durham) and Watercraft Sales Center, Inc. (Watercraft) have standing to recover for injuries caused as a result of an illegal horizontal agreement between appellants Bombadier Limited (Bombadier) and Agrati-Garelli (Agrati). My brethren have determined that our initial decision was correct and they stand on that opinion. Fully recognizing the complexity of the issues involved and the closeness of the question presented, I nevertheless respectfully dissent from that view and would hold that Durham and Watercraft do have standing.

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*Of the District of Rhode Island, sitting by designation.

The full relevant factual background of this case is set forth in the prior opinion of this court, see *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F. 2d 1 (1st Cir. 1979). I briefly summarize only the especially pertinent portions thereof.

In late 1970, appellants Bombardier and Agrati entered into a territorial and product market division agreement. In return for Bombardier's agreement to abandon the manufacturing and selling of its own "Fun-Doo" minicycle, Agrati agreed not to manufacture or sell a new 50-100 cc motorcycle, to terminate its exclusive distribution agreement with Engine Specialties, Inc. (ESI), and to grant Bombardier exclusive distribution rights for Agrati's "Broncco" minicycle in North America.

Durham and Watercraft purchased Agrati minicycles from ESI for subsequent distribution to dealers. When ESI had its supply cut off pursuant to the Agrati-Bombardier agreement, Durham and Watercraft likewise lost their ability to procure Agrati minicycles, the subsequent distribution of which was taken over by Bombardier and its subsidiary, Bombardier East. ESI and Durham discontinued sales of minicycles.

There is no doubt that Durham and Watercraft were injured as a result of the described transactions. This fact alone, as the court indicates in its opinion, does not give them standing. It should, however, lead us to proceed to consider in further detail the question of standing on the facts of this case.

The underlying substantive antitrust violation which gave rise to this case was a horizontal agreement between Agrati and Bombardier to allocate territorial and product markets between themselves and terminate ESI's role in the distribution of Agrati minicycles. Horizontal market divisions in general are condemned under the antitrust laws because they serve no purpose other than the stifling of competition. *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963). In this case, it is possible that the purchasers of minicycles, including ESI, Durham and Watercraft, would have benefited had

Bombardier chosen to compete with Agrati rather than illegally agreeing not to do so. "[H]ad Bombardier and Agrati not so conspired, there would have been *two* minicycles...to choose from rather than *one* that the conspiracy delved up." 605 F. 2d at 14. In any event, ESI's bargaining power vis-a-vis Agrati most certainly would have increased had Agrati not succeeded in securing Bombardier's agreement not to compete in the manufacturing and selling of minicycles.

This is not to say that ESI necessarily would have retained its ability to purchase minicycles for distribution. It is to say, rather, that the question whether ESI would retain that ability would have been determined by the forces of competition rather than by agreement between competitors, "[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity, whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because [others so agree]." *United States* v. *Topco Assoc.*, 405 U.S. 596, 610 (1972). Because the damage to ESI caused by the Agrati-Bombardier agreement was the loss of that freedom, we correctly found that it is able to recover antitrust damages against the defendants.

Turning to Durham and Watercraft, I note that they in effect tied their fortunes to ESI's success in obtaining access to the minicycle manufacturing and sales market. They therefore could be charged with assuming the risk that ESI might prove unsuccessful if, for example, Agrati unilaterally terminated ESI as its chosen distributor. They did not, however, assume the risk that Agrati and Bombardier would get together, carve up their territories according to agreement, and completely foreclose ESI from the minicycle market. When that foreclosure occurred, Durham and Watercraft suffered injury which was similar to, albeit derivative of, that suffered by ESI. All were foreclosed from the minicycle market as a result

of the Agrati-Bombardier agreement. The key question therefore, is why should we distinguish between ESI on the one hand and Durham and Watercraft on the other on the issue of standing.

In attempting to show that the court errs in creating such a distinction, I note first that the mere fact that the injury to Durham and Watercraft was derivative, or that they operated at different levels of the minicycle distribution market than did ESI is not itself dispositive. Courts have often found standing in such circumstances. See e.g., *Sanitary Milk Producers* v.*Bergjans Farm Dairy*, 368 F. 2d 688-89 (8th Cir. 1966); *South Carolina Council of Milk Producers* v. *Newton*, 360 F. 2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955). This fact does, however, justify a careful scrutinizing of the variety of additional factors, because the derivative nature of the injury, while itself not dispositive, can indicate that other reasons exist for denying standing. See, e.g., *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (duplicative recoveries).

A helpful analysis of the pertinent possible factors is set forth in 2 P. Areeda and D. Turner, Antitrust Law ¶¶ 334-341 (1978). Courts have generally tended to focus upon various sets of these factors under the rubric of either the "target area" test or the "direct injury" test. My brethren have opted for such an approach in this case. Finding the use of these rubrics unhelpful and in this case misleading, see generally, D. Berger & R. Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale Law Journal 809 (1977), I prefer to proceed to a direct analysis of the pertinent factors themselves.

The fact that the injuries to Durham and Watercraft derived from those to ESI gives rise to a concern that awarding damages to both sets of plaintiffs might result in the awarding of duplicative recoveries. In this case, however, ESI, Durham, and Watercraft joined as plaintiffs and the measure of damages employed was lost profits. Thus, granting Durham

and Watercraft standing will nor result in duplicative recoveries since each party will only be reimbursed for its own actual injuries, nor will the defendant incur the risk of inconsistent judgments. Indeed, the court's decision to deny standing might result in a windfall to the defendant. Moreover, since the lost profits measure of damages was employed and since the injury consisted of complete foreclosure from the market, allowing Durham and Watergate standing would not create the complicated damage computations which the court in *Illinois Brick* sought to avoid with regard to "pass on" damage measures in price fixing cases. See 431 U.S. at 740-45.

The lack of a possibility of duplicative recoveries is a particularly important factor. The fear of allowing such recoveries has been a major rationale behind the judicial limitation of the Clayton Act's seemingly limitless literal grant of standing. Once this rationale is removed, as it is in this case, I think we should be hesitant to continue to limit the Act's broad language given the substantive congressional policies of compensation and deterrence which lay behind its enactment, see D. Berger & R. Bernstein, *supra*, as long as the injury for which plaintiffs seek compensation is one which the substantive antitrust rules are intended to prevent.

The derivative nature of the injuries in this case also requires us to focus our attention on the possibility that problems of tracing causation might render an award to Durham and Watercraft unduly speculative. In some cases, there may be "too many layers, changes of product form, or independent business decisions by intermediate persons to permit reasonable tracing of the connection between the plaintiff's injury and defendant's violation." 2 P. Areeda and D. Turner, *supra*, ¶ 334e, at 168. Here, however, the basic product—the minicycle—remained unchanged as it passed from defendants to ESI and then to Durham and Watercraft. Thus, the problems of tracing causation and apportioning damages are not present. Compare *South Carolina Council of Milk Producers*

Newton, 360 F. 2d 679, 688-89 (8th Cir. 1966) with *Billy Baxter* v. *Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). See generally, 2 P. Areeda & D. Turner, *supra* at ¶ 340d.

Finally, I address the point upon which the court bases its holding—that Durham and Watercraft were "hit but not aimed at". 605 F. 2d at 17. On further reflection, I find the court's reliance on this point misplaced and the major cause of what I regard as its error. The pertinent inquiry required in this case is not which companies were "aimed at" by the defendants, but rather which area of the economy was affected in a manner that the antitrust laws are designed to prevent. See e.g., *In Re Multidistrict Vehicle Air Pollution M. D. L. No. 31*, 481 F. 2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). "In order to state a cause of action under the antitrust laws a plaintiff must show...that he is within the area of the economy of competitive conditions in a particular industry." *Conference of Studio Unions* v. *Loew's*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

In holding that ESI had standing, we necessarily held that the distribution level of the minicycle market was affected by the agreement between the manufacturers. Indeed, in this case it would have been particularly inappropriate to have held otherwise, for here the defendants as part of their agreement jointly dictated the manner in which the minicycles would be distributed. Specifically, they jointly agreed that ESI would no longer be able to obtain minicycles, either "Broncos" or "Fun-Doos". Since Durham and Watercraft were minicycle distributors and their access to the manufacturing market through ESI was completely foreclosed by the defendants' agreement, they, too, were in the area of the economy affected by the illegal aspects of the defendants' actions.

In light of the foregoing analysis, I would find that Durham and Watercraft do have standing to recover for injuries caused as a result of the illegal and horizontal agreement between Agrati and Bombardier.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
Plaintiffs, Appellees,

v.

BOMBARDIER LIMITED, *et al.*,
Defendants, Appellants.

CORRECTED JUDGMENT

Entered July 26, 1979

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nunc pro tunc July 25, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed with respect to Durham and Watercraft with an order that judgment n.o.v. be entered for defendants as to those plaintiffs. In all other respects, the judgment is affirmed.

Appellees are to receive 80% of their costs in this appeal.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Vanderstar and Fremont-Smith.]

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 78-1492.

ENGINE SPECIALTIES, INC., ET AL.,

PLAINTIFFS, APPELLEES,

v.

BOMBARDIER LIMITED, ET AL.,

DEFENDANTS, APPELLANTS.

Before COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge* and
PETTINE, *District Judge.**

ORDER

Entered September 21, 1979

The petition for rehearing is granted, but is limited to the filing of memoranda or briefs only. There will be no oral rehearing. The parties are granted leave to file supplemental memoranda or briefs on the issue of the standing of Durham and Watercraft to recover under the horizontal restraints theory.

Memoranda or briefs shall be filed on or before October 9, 1979.

By the Court:
DANA H. GALLUP, *Clerk*

By /s/ FRANCIS P SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Vanderstar, Fremont-Smith and Galvani.]

*Of the District of Rhode Island, sitting by designation.